Supreme Court, U.S.
FILED

96 516 SEP 30 1996

No. 96- OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

R.R. DONNELLEY & SONS COMPANY,
Petitioner,

v.

LAWRENCE H. FUCHS, Executive Director of the Department of Revenue of the State of Florida, and DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Respondents.

Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state sales and use tax on the purchase of new equipment, which exempts all manufacturers other than printing firms, is unconstitutional under this Court's decision in *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983).

PARTIES TO THE PROCEEDINGS

The petitioner in this case, appellant below, is R.R. Donnelley & Sons Company. Respondents in this case, appellees below, are Lawrence H. Fuchs, Executive Director of the Department of Revenue of the State of Florida, and the Department of Revenue of the State of Florida. Petitioner has no parent company. Petitioner has two subsidiaries that are not wholly owned: Stream International, Inc. and Metromail Corporation.

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Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

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PETITION FOR A WRIT OF CERTIORARI

R.R. Donnelley & Sons Company ("Donnelley") respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal of Florida, First District, in this case.

OPINIONS BELOW

The order of the Supreme Court of Florida denying discretionary review is reported only as a table decision, 677 So. 2d 841 (Fla. 1996), and is reprinted at page 1a of the appendix to this petition. The opinion of the Florida Court of Appeal, First District, is reported at 670 So. 2d 113 (Fla. Ct. App. 1996), and is reprinted beginning at page 2a of the appendix. The opinion

of the Circuit Court of the Second Judicial Circuit, In and For Leon County, Florida, is unreported, and is reprinted beginning at page 9a of the appendix.

JURISDICTION

The judgment of the Supreme Court of Florida denying discretionary review in this case was entered on July 1, 1996. The judgment of the District Court of Appeal of Florida, First District, was entered on March 5, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The provisions at issue are the First Amendment to the United States Constitution, U.S. Const. amend. I, and Fla. Stat. §§ 212.05(1)(a), (b), 212.08(5)(b)1-2, 5. These provisions are reprinted in the appendix to this petition beginning at page 16a.

STATEMENT OF THE CASE

This case presents a First Amendment challenge to a state statutory scheme that imposes a sales and use tax on the purchase of new equipment by the printing industry — including the publishers of newspapers, magazines, and books — to start or expand operations in Florida. That same tax is not imposed on the purchase of new equipment by any other manufacturers. The decision below upholding this tax is inconsistent with *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), which held that a state tax that singles out the press for disparate treatment can be sustained only upon a compelling justification. This Court's review is warranted in order to assure that the First Amendment protection accorded the press by cases such as *Minneapolis Star* is not undermined.

* * *

For some decades, the printing industry has sought to modernize its operations, and to make them more economical and efficient, by acquiring new equipment that will require fewer employees to set type, operate the presses, and otherwise produce

printed materials. Many have viewed this trend toward automation as essential to the survival of the printing industry and, indeed, of the print press as an institution.[1] This trend has not been without controversy, however, especially among unions and jurisdictions affected by the loss of printing jobs.[2] This controversy has apparently been reflected in the provisions of the Florida tax code at issue here, which have been crafted to deny to Florida printers, alone among all Florida manufacturers, a generally available tax exemption for the acquisition of new equipment. The denial of this exemption can significantly increase the cost of purchasing automated printing equipment. It increased the cost of the printing equipment purchased in this case by nearly two million dollars.

Petitioner R.R. Donnelley & Sons ("Donnelley") is a commercial printer with offices in 24 states and 21 foreign countries. Donnelley prints a wide variety of materials, including books, magazines, newspaper supplements, and financial materials. Among its publications are *Time, Newsweek, The New York Times Magazine, Foreign Affairs, Farm Journal, Nation's Business, Readers' Digest*, and *Good Housekeeping*.

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[1] *See, e.g.*, Howard Bray, *The Pillars of the Post* 251-89 (1980); United States Dep't of Commerce, *Printing and Publishing Industry Overview*, U.S. Industrial Outlook (Jan. 1994) (explaining that given the strains on the printing industry "[c]apital investment programs focus on increasing plant efficiencies, and have resulted in lowering the ratio of production workers to total employment to 53 percent in 1993 from 65 percent in 1973").

[2] *See, e.g.*, Gary Klott, *For Some, Job Anxiety is Justified*, Ft. Lauderdale Sun Sentinel, Mar. 3, 1996, at 3F ("As has been the case over the past decade, automation is expected to claim tens of thousands of additional factory jobs, including . . . various printing jobs, such as typesetters and paste-up."); Drew Von Bergen, *Union Leader Beaten in Re-election Bid*, UPI, July 27, 1984 (noting that "automation has supplanted thousands of jobs in the newspaper and printing industries over the past decade").

In 1990, Donnelley opened a printing plant in South Daytona Beach, Florida. Donnelley purchased a substantial amount of capital equipment for the plant, including printing presses, equipment to create printing plates, and machinery to cut, bind, and mail printed materials.

In 1993, Donnelley undertook a major expansion of the Daytona Beach plant. Donnelley then purchased and installed additional equipment, including a state-of-the art printing press.

Donnelley paid state sales and use taxes on both its initial 1990 capital purchases and its 1993 capital expansion. Donnelley then sought refunds from the Florida Department of Revenue under two parallel statutory provisions that provide an exemption from sales and use taxes for purchases of capital equipment to start or expand manufacturing operations. Fla. Stat. Ann. §§ 212.08(5)(b)1; 212.08(5)(b)2.

Under these provisions (collectively referred to here as the "manufacturing equipment exemption"), such equipment purchases are not subject to sales and use tax if:

(1) the taxpayer "manufacture[s], process[es], compound[s], or produce[s]" tangible personal property for sale;

(2) the taxpayer's operations are at a "fixed location" in Florida;

(3) the taxpayer uses the equipment to start a "new business" or to expand the productive output of an existing business by at least 10 percent; and

(4) the taxpayer purchases all of the equipment before the commencement or expansion of its operations, and receives all of the equipment within 12 months after the commencement or expansion of its operations.

It is undisputed that Donnelley's equipment purchases — both to start the Daytona Beach printing plant in 1990 and to expand that printing plant in 1993 — satisfied all of these requirements.

See R.R. Donnelley & Sons No. 93-4780, Circuit Court Record, Stip. ¶¶ 12, 14, 16-20, 28.

The Department of Revenue, however, denied Donnelley any tax exemption. The Department of Revenue relied on a separate subdivision of the same statute (the "printing exception"), which explicitly excludes "printing or publishing firms" from the manufacturing equipment exemption. Fla. Stat. Ann. § 212.08(5)(b)5. On November 9, 1993, Donnelley filed suit in Florida state court, challenging the printing exception of § 212.08(5)(b)5. Donnelley contended that this provision — by singling out the press for differential taxation and by irrationally taxing printers differently than similar industries — violated the First Amendment and the Fourteenth Amendment's Equal Protection guarantee, as well as equivalent state constitutional provisions.

The State attempted to defend § 212.08(5)(b)5 on the ground that it does not, by its terms, deny the manufacturing equipment exemption only to printing firms. However, although the exception also references eight other categories of businesses ranging from electric utilities to mining companies to hotels, the State did not dispute that printing companies are the only manufacturers which are actually affected by the exception.

The State's designated witness conceded at his deposition, moreover, that § 212.08(5)(b)5 has absolutely no effect on seven of these categories of businesses. The new equipment exemption, to which § 212.08(5)(b)5 provides an exception, applies only to purchases of equipment for use in producing tangible personal property. Six of the categories of businesses referenced in § 212.08(5)(b)5 do not produce tangible personal property.[3]

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[3] Petitioner deposed Jeffery Soff, the Department of Revenue's designated representative, on July 14, 1994. Mr. Soff explained that these other categories of businesses do not produce what the Department of Revenue defines as tangible personal property, and thus would not be entitled to the manufacturing equipment exemption in the first place. *See, e.g.*, Deposition of Jeffery Soff ("Soff Dep.") at 82-85

Accordingly, even if these categories of businesses were not included in § 212.08(5)(b)5, they still could not take advantage of the new equipment exemption.

A seventh category of businesses referenced in § 212.08(5)(b)5 — electric utility companies — is also unaffected by that provision. A separate statutory provision expressly exempts electric utility companies from taxes on their purchases of equipment. Fla. Stat. Ann. § 212.08(5)(c).

That leaves printing firms as the only manufacturers that are actually denied a tax exemption by § 212.08(5)(b)5 — and printing firms and restaurants as the only businesses of any type that are affected by § 212.08(5)(b)5. Both the Department of Revenue and the Court of Appeal have suggested that printing firms were denied the tax exemption because they are highly automated. App. 8a; Appellee's Answer Br. 23, *R.R. Donnelley & Sons Co. v. Fuchs*, No. 95-00769 (Fla. Ct. App., filed June 15, 1995). It has not been suggested, however, that the automation rationale applies to restaurants; nor could this rationale conceivably apply to the labor-intensive restaurant business.

After discovery, the case was submitted for decision on stipulated facts. The trial court sustained the statute (App. 9a), and the District Court of Appeal, First District, affirmed (App. 2a). The Court of Appeal acknowledged that an exception to a

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(communications companies do not produce tangible personal property and thus are ineligible for the exemption); *id.* at 88 (mining and mineral companies do not produce tangible personal property and thus are ineligible for the exemption); *id.* at 89 (oil and gas exploration and production companies do not produce tangible personal property and thus are ineligible for the exemption); *id.* at 90 (hotels do not produce tangible personal property and thus are ineligible for the exemption); *id.* at 92 (publishing companies, in contrast to printing companies, do not produce tangible personal property, but instead merely prepare materials for publication through, *e.g.*, layout and editing; they are therefore ineligible for the exemption).

tax exemption, if directed exclusively at the press, presents significant First Amendment concerns. App. 5a-6a (citing *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. at 585; *Globe Newspaper Co. v. Commissioner of Revenue*, 571 N.E.2d 617 (Mass. 1991)).

The court observed that the case law provides "little guidance" as to when a statute that singles out the press and another entity for unfavorable treatment may violate the First Amendment. App. 6a. The court noted that several categories of businesses other than the press are mentioned in § 212.08(5)(b)5, asserting that "there is some dispute concerning the applicability [of the exception] to other groups." App. 6a. However, solely because § 212.08(5)(b)5 applies to restaurants as well as to printers, the court declined to hold the provision unconstitutional. App. 6a-7a.

Turning to the equal protection claim, the Court of Appeal suggested that the state legislature chose to accord less favorable tax treatment to the printing industry than to other industries because "a modern printing plant such as Donnelley's requires a large investment in machinery, but is highly automated." App. 8a. The court concluded that "[t]he Legislature could well have determined that this state of facts did not warrant extending the exemption to printing or publishing firms" and that such a decision would have been sufficiently rational to withstand an equal protection challenge. *Id.*

The Florida Supreme Court denied discretionary review on July 1, 1996, with one justice dissenting. App. 1a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THE MASSACHUSETTS SUPREME JUDICIAL COURT BY PERMITTING DISCRIMINATORY TAX TREATMENT OF THE PRESS

The State's decision to single out the press — alone among all manufacturers in Florida — for taxation of new equipment purchases violates the First Amendment. This Court has made clear that, while the press is not exempted by the First Amendment from "generally applicable" state taxes, the press cannot be singled out for unfavorable tax treatment absent "an overriding governmental interest." *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 582-83 (1983); *accord Grosjean v. American Press Co.*, 297 U.S. 233, 244-45 (1936).

In *Minneapolis Star*, the Court invalidated a state use tax on the paper and ink used in printing newspapers and magazines. The tax subjected the press, unlike other manufacturers, to a tax on items used in the production of retail goods. 460 U.S. at 577. Justice O'Connor, writing for the Court, explained why taxes that are targeted at the press — and thus are not subject to "the political constraints that prevent a legislature from passing crippling taxes of general applicability" — present significant First Amendment concerns: The mere threat of burdensome differential taxation "can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government." *Id.* at 585.

The Massachusetts Supreme Judicial Court recently followed *Minneapolis Star* in invalidating a discriminatory tax scheme similar to the one here. *Globe Newspaper Co. v. Commissioner of Revenue*, 571 N.E.2d 617 (Mass. 1991). The Massachusetts tax code had long given manufacturers an exemption from sales and use taxes for their purchases of machinery and materials. The code was then amended to deny the tax exemption to

newspaper publishers. The Massachusetts court recognized that, because "all manufacturers except newspaper publishers" received the tax exemption, this was the sort of differential taxation of the press that warranted strict scrutiny. *Id.* at 619-20. The court struck down the amendment as contrary to the First Amendment because the State could not adequately justify singling out the press.

The same First Amendment issue presented in *Minneapolis Star* and *Globe Newspapers* is presented here. This case, like those cases, involves a state tax scheme that is "facially discriminatory, singling out publications for [disparate] treatment" vis-a-vis all other manufacturers. *Minneapolis Star*, 460 U.S. at 581. Printing firms, unlike all other Florida manufacturers, are denied the benefits of the tax exemption for investments in capital equipment to start or expand a manufacturing facility.

Contrary to the conclusion of the court below, the mere inclusion of restaurants as well as printing firms in § 212.08(5)(b)5 does not save that provision from invalidation as a tax that singles out the press for discriminatory treatment. *Minneapolis Star*, in fact, implicitly rejected the very argument that the Florida court adopted here. In *Minneapolis Star*, the Minnesota tax code, like the Florida tax code here, discriminated against the press and in favor of all other manufacturers.[4] That said, the Minnesota tax scheme invalidated by the court treated the press just as it did another large class of businesses — service businesses that were required to pay a sales or use tax on the inputs that they purchased, but that were not required to pay a sales or use tax on the sales that they made to the public.[5]

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[4] *See* Minn. Stat. § 297A.14 (1982 ed.) (imposing use tax generally and specifically on the press); § 297A.25(h) (exemption from sales and uses taxes for "all materials . . . used or consumed in agricultural or industrial production of personal property intended to be sold ultimately at retail").

[5] *See* Minn. Stat. §§ 297A.14, 297.25(i) (exemption from sales and use tax on retail sales of publications).

However, because the press was not treated the same as other manufacturers, the tax on the press was held invalid. The same situation existed in *Globe Newspaper*, which held that newspapers could not be denied an exemption from the sales and use tax that applied to other manufacturers of tangible personal property, even though the exemption was also not available to non-manufacturing businesses. *See* 571 N.E.2d at 618. So, too, here, by treating the press less favorably than other manufacturers, § 212.08(5)(b)5 violates the First Amendment, without regard to whether the press is being treated similarly to restaurants or other non-manufacturing businesses. In these circumstances, *Minneapolis Star* and *Globe Newspaper* cannot be distinguished from this case.[6]

This Court's decisions under the Equal Protection Clause and the Commerce Clause confirm the correctness of the *Minneapolis Star-Globe Newspaper* approach and the error of the court below. In determining whether a tax is discriminatory in the equal protection context, this Court has considered whether the tax falls evenhandedly on members of the same "class." *See, e.g., Allegheny Pittsburgh Coal v. Webster County*, 488 U.S. 336, 343 (1989) ("The Equal Protection Clause applies only to taxation which in fact bears unequally on persons or property *of the same class*.") (emphasis added) (internal quotation omitted). It is irrelevant whether members of different classes are taxed similarly. *See, e.g., Cumberland Coal Co. v. Board of Revision*, 284 U.S. 23, 29-30 (1931) (recognizing that imposing same rate of tax on differently situated properties may be just as discriminatory as imposing different rates of tax on similarly situated properties).

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[6] The sole distinction between *Minneapolis Star* and this case is that here the denial of the tax exemption for other businesses appears in the same subsection of the tax code as the denial of the exemption for the press, whereas in *Minneapolis Star* the other businesses subject to the tax on inputs were never entitled to the exemption in the first place. This is a distinction without a difference.

This same approach is appropriately applied to determine whether a state tax statute does, in fact, "single out" the press in violation of the First Amendment when the statute applies to another industry in addition to the press. If the other industry is not in the same "class" as the press for any purpose relevant to the tax statute, the inclusion of the other business in the statute is, at best, irrelevant. (At worst, the inclusion of another industry that bears no similarity to the press may suggest that the statute was motivated not by any coherent economic rationale, but instead by a desire to discriminate against the press without running afoul of *Minneapolis Star*).

Accordingly, whether or not restaurants are subject to the same tax treatment as printing firms under § 212.08(5)(b)5 should have no bearing on the First Amendment analysis, because restaurants and printing firms are not members of the same class for purposes of taxation. Neither the Department of Revenue nor the court below has ever articulated any common characteristic of restaurants and printing firms that justifies denying them the tax exemption for the acquisition of new capital equipment. It is self-evident that these businesses are quite dissimilar. Printing firms are manufacturing businesses, whereas restaurants are service businesses. The United States Department of Commerce, for example, classifies printing as a "manufacturing industry," together with such industries as textile production, chemical manufacturing, automaking, and metal fabrication; in contrast, the Department of Commerce classifies restaurants as a "service industry." *See* United States Dep't of Commerce, *Regional Multipliers: A User Handbook for the Regional Input-Output Modeling System* (RIMS II), M-22, 12 (2d ed. 1992).

Nor has the State or the court below articulated any common rationale for denying the tax exemption to printers and restaurants. They have suggested that the tax exemption was denied to the printing industry because it "is highly automated" (App. 8a) and thus may not be expected to generate many new jobs. This automation rationale does not apply, and is not even claimed to apply, to restaurants.

In the absence of any reason to conclude that printers are in the same class as restaurants for purposes of determining entitlement to the manufacturing equipment exemption, the constitutionality of the printing exception to that tax exemption should be determined without reference to the restaurant exception. Section 212.08(5)(b)5 should be viewed, in effect, as two separate tax provisions, not as one. It then becomes obvious that the printing exception, like the paper and ink tax in *Minneapolis Star* and the press exception to the tax exemption in *Globe Newspapers*, is a statute that singles out the press for disparate treatment. The Florida courts' decision to uphold the printing exception cannot, therefore, be reconciled with *Minneapolis Star* and *Globe Newspapers*.

The decision below also conflicts in principle with a long line of this Court's Commerce Clause decisions — the most recent of which is *Associated Industries of Missouri v. Lohman*, 114 S. Ct. 1815 (1994) — that hold that discrimination against out-of-state businesses cannot be justified on the theory that some limited number of in-state businesses also bear a disparate burden.[7] In the First Amendment context, just as in the Commerce Clause context, the failure to completely eliminate discrimination between the disfavored class and the favored class should result in a finding of unconstitutionality. Indeed, given the strict scrutiny

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[7] *See, e.g., Associated Indus. of Mo. v. Lohman*, 114 S. Ct. 1815 (1994) (striking down use tax in counties where it exceeded sales tax, even though use tax was lower than sales tax in other counties); *Bacchus Imports v. Dias*, 468 U.S. 263 (1984) (striking down liquor tax that favored locally produced brandy and wine, despite the fact that some locally made liquors were also subject to the tax); *Polar Ice Cream & Creamery Co. v. Andrews*, 375 U.S. 361 (1964) (striking down statute requiring that certain milk purchases be made from within four-county marketing area, despite the fact that statute also discriminated against in-state milk produced in other counties); *Brimmer v. Rebman*, 138 U.S. 78 (1891) (invalidating tax on meat slaughtered 100 miles or more from place of sale, though provision resulted in taxation of some in-state meat).

that applies to statutes challenged under the First Amendment for disfavoring the press, this result should be particularly obvious. A state should not be permitted to argue that discrimination against the press is constitutional simply because some small category of other businesses is similarly disfavored.

II. THIS CASE PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW THAT SHOULD BE RESOLVED BY THIS COURT

While this Court has had several opportunities to clarify the second component of *Minneapolis Star*, which deals with discrimination among members of the press, as the court below recognized, this Court has not yet had an opportunity to clarify the first component of *Minneapolis Star*, which deals with discrimination against the press. It is this aspect of *Minneapolis Star* that is particularly vital for assuring the continued independence of the press. This case offers the Court that opportunity.

A primary purpose of the adoption of the First Amendment was to protect the print press because of its contribution to American democracy. Thomas Jefferson, himself a frequent critic of the press, recognized its value when he stated, "were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter." 11 *The Papers of Thomas Jefferson* 49 (Boyd ed.) (1955).

This Court's decisions have repeatedly recognized the central role of a free press to "the American form of government." *New York Times Co. v. Sullivan*, 376 U.S. 254, 275 (1964); *see also New York Times Co. v. United States*, 403 U.S. 713, 717 (1971) (per curiam) (Black, J., concurring) ("In the First Amendment the Founding Fathers gave the free press the protection it must have to fulfill its essential role in our democracy."). The Court has also long understood that press freedom may be endangered by unfair state taxation of the press. Sixty years ago, in invalidating a state tax on newspapers in *Grosjean v. American Press Co.*, the Court recounted at length the Framers' concern with taxation of

the press. 297 U.S. at 246. The Court found inescapable the conclusion that one of the central purposes of the First Amendment was to prevent such "taxes on knowledge" that curtailed the circulation of information critical to an informed citizenry. *Id.*; *see also Minneapolis Star*, 460 U.S. at 583-84 (discussing Framers' concern with the chilling effects of taxation on the press).

Today, the print press in the United States faces difficult times. The number of daily newspapers has declined by more than 200 since 1950.[8] Many believe that the print press can survive only by intensive automation, no matter how painful that process may be to the affected workers and jurisdictions.[9] If state and local governments are permitted to discourage that process by discriminatory taxation, the print press will be seriously disadvantaged.

The decision below opens the door nationwide to taxation schemes specifically designed to discriminate against the press. The Florida courts have indicated that all that a state need do in order to circumvent the requirements of *Minneapolis Star* is to impose the discriminatory tax on the press and one other industry. It makes no difference whether that other industry has anything in common with the press. If allowed to stand, the decision below will undermine *Minneapolis Star* and render illusory the First Amendment protection accorded the press from discriminatory state taxation.

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[8] Carol Felsenthal, *Two Former Reporters Offer A Primer On How Newspapers Work*, Chicago Tribune, Book Section, July 14, 1996, at 5.

[9] *See supra* page 3.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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September 30, 1996

APPENDIX

SUPREME COURT OF FLORIDA

Monday, July 1, 1996

R. R. DONNELLEY & SONS COMPANY,

Petitioner,

v.

LAWRENCE H. FUCHS, etc., et al.,

Respondents.

CASE NO. 87,695

District Court of Appeal,
1st District - No. 95-769

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, SHAWN, HARDING and ANSTEAD, JJ., concur
GRIMES, J., dissents

A True Copy

[Seal]

Sid J. White
Clerk, Supreme Court

BHP

cc: Hon. Jon S. Wheeler, Clerk
Hon. Dave Lang, Clerk
Hon. L. Ralph Smith, Judge

Mr. James M. Ervin, Jr.
Ms. Susan L. Turner
Ms. Maryann B. Gall
Mr. Todd S. Swatsler
Mr. Douglas M. Mansfield
Mr. Eric J. Taylor

THE DISTRICT COURT OF APPEAL FIRST DISTRICT,
STATE OF FLORIDA

R.R. DONNELLEY & SONS COMPANY,

Appellant,

v.

LAWRENCE H. FUCHS, EXECUTIVE DIRECTOR OF THE DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, and DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA,

Appellees.

Not Final Until Time Expires To File Motion For Rehearing And Disposition Thereof If Filed

CASE NO. 95-769

Opinion filed March 5, 1996.

An appeal from the Circuit Court for Leon County.

L. Ralph Smith, Jr., Judge.

James M. Ervin, Jr. and Susan L. Turner of Holland & Knight, Tallahassee; Maryann B. Gall, and Todd S. Swatsler of Jones, Day, Reavis & Pogue, Columbus, Ohio, for appellant.

Robert A. Butterworth, Attorney General; Lealand L. McCharen, Assistant Attorney General; Eric J. Taylor, Assistant Attorney General, Tallahassee, for appellees.

WOLF, J.

R. R. Donnelley & Sons Company (Donnelley) appeals from a final order denying appellant's request for a refund of state sales taxes paid pursuant to section 212.08(5)(b), Florida Statutes, and declaring that the statute does not violate the Florida or federal constitutions. Donnelley claims (1) that section 212.08(5)(b)5.,

Florida Statutes, violates the freedom of the press guaranteed by the Florida and United States Constitutions; and (2) that section 212.08(5)(b)5. violates the Equal Protection Clauses of the Florida and United States Constitutions. We find no error in the trial court's determination that the statute is constitutional, and we affirm.

Donnelley is in the business of printing books, magazines, financial material, advertisements, telephone directories, and catalogs, with operations at 45 major printing sites in 24 states. In 1991, Donnelley opened a printing plant in South Daytona Beach, and expanded that plant in 1993. At both times, Donnelley purchased capital equipment. The appellant filed an application for statutory exemption from sales tax for the equipment purchases, which was denied by the Department of Revenue (department), pursuant to section 212.08(5)(b)5., Florida Statutes.

Florida imposes a sales and use tax on purchases of tangible personal property. It assesses a six percent sales tax on the price of tangible personal property sold at retail, *see* section 212.05(1)(a)1.a, and imposes a corresponding use tax on the price of tangible personal property that, while not purchased in Florida, is used there. *See* § 212.05(1)(b). Sections 212.08(5)(b)1. and (5)(b)2., Florida Statutes, provide for a refund of taxes paid for the purchase of machinery and equipment used to start an operation which manufactures taxable personal property for sale and a partial refund of taxes paid for the purchase of machinery and equipment used to expand a business which manufactures taxable personal property for sale. The plaintiff was found ineligible for this refund by the department, based upon section 212.08(5)(b)5., Florida Statutes. That section provides,

> [t]he exemptions provided in subparagraphs 1. and 2. do not apply to machinery or equipment purchased or used by electric utility companies, communications companies, phosphate or other solid minerals severance, mining, or processing operations, oil or gas exploration or production operations, printing or publishing firms, any firm subject to regulation by

> the Division of Hotels and Restaurants of the Department of business and Professional Regulation, or any firm which does not manufacture, process, compound, or produce for sale, . . . items of tangible personal property.

On November 9, 1993, the appellant filed a complaint in circuit court challenging the validity of section 212.08(5)(b)5. under federal and state law. Appellant sought a declaratory judgment that section 212.08(5)(b)5. was constitutionally invalid, and sought a refund of all taxes paid under the provisions as well as attorney's fees and costs. Following a hearing on the matter, the trial court issued a written opinion upholding the statute in all respects.

In *Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438 (1991), the United States Supreme Court addressed First Amendment concerns raised in regard to an Arkansas sales tax imposed on receipts from sales of goods and services which expressly exempted newspaper and magazine sales, but did not exempt cable television related services. While finding that a cable television operation is engaged in First Amendment-protected "speech," the Supreme Court held that the Arkansas tax did not run afoul of the First Amendment. The Court held that the tax did not (1) single out the press;[1] or (2) target a small group of speakers;[2] or (3) discriminate on the basis of content of speech.[3] The Court held,

> [t]he Arkansas Legislature has chosen simply to exclude or exempt certain media from a generally applicable tax. Nothing

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[1] *Id.* at 1443 (citing *Grosjean v. American Press Co.*, 297 U.S. 233, 244-249, 56 S. Ct. 444, ____, 80 L. Ed. 660, ___ (1936); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585, 103 S. Ct. 1365, ___, 75 L. Ed. 2d 295, ___ (1983)).

[2] *Id.* at 1443-1444 (citing *Minneapolis Star*, 460 U.S. at 575; *Arkansas Writer's Project, Inc. v. Ragland*, 481 U.S. 221, 229, 107 S. Ct. 1722, ___, 95 L. Ed. 2d 209 (1987)).

[3] *Id.* at 1444 (citing *Grosjean*, 297 U.S. at 229-231).

> about that choice has ever suggested an interest in censoring the expressive activities of cable television. Nor does anything in this record indicate that Arkansas's broad-based, content-neutral sales tax is likely to stifle the free exchange of ideas. We conclude that the State's extension of its generally applicable sales tax to cable television services alone, or to cable and satellite services, while exempting the print media, does not violate the first amendment.

Relying on *Leathers*, the Florida Supreme Court in *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So. 2d 459 (Fla. 1992), found that Florida's chapter 212 sales tax is

> a tax of *general applicability* which applies to receipts from the sales of all tangible personal property unless specifically exempted, and *does not single out the press for special treatment.*

Id. at 461 (emphasis added). The court in that case concluded that Florida "may impose a generally applicable tax on the press without raising first amendment concerns." *Id.*

The appellant argues that section 212.08(5)(b)5. is not a generally applicable tax because it prohibits printers from obtaining an exemption that other manufacturers receive, and the exemption is a "printing tax" under which it has been singled out for taxation.

In *Minneapolis Star and Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed. 2d 295 (1983), the Supreme Court discussed the potential evils of a tax that singles out a small portion of the press:

> A power to tax differentially, as opposed to a power to tax generally, gives a government a powerful weapon against the taxpayer selected. When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency. *See Railway Express*

> *Agency v. New York*, 336 U.S. 106, 112-113, 69 S. Ct. 463, 467, 93 L. Ed. 533 (1949) (Jackson, J., concurring). When the State singles out the press, though, the political constraints that prevent a legislature from passing crippling taxes of general applicability are weakened, and the threat of burdensome taxes becomes acute. That threat can operate as effectively as a censor to check critical comment by the press, undercutting the basic assumption of our political system that the press will often serve as an important restraint on government. *See generally*, Stewart, "Or of the Press," 26 Hasting L.J. 631, 634 (1975). "[A]n untrammeled press [is] a vital source of public information," *Grosjean*, 297 U.S., at 250, 56 S. Ct., at 449, and an informed public is the essence of working democracy.

Id. at 585.

In *Globe Newspaper Co. v. Commissioner of Revenue*, 571 N.E.2d 617 (Mass. 1991), the Court recognized that the denial of an exemption to a tax of general applicability may also result in a violation of the First Amendment if it singles out the press. *See also Speiser v. Randall* , 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958), holding that a denial of a tax exemption may result in a First Amendment violation.

The question before us is whether denial of the exemption affects a group of people so small as to be considered singling out the press for special treatment. Little guidance is provided in either the case law or the record in front of us as to when the group of people is so small as to when it constitutes differential treatment of the press. In the *Minneapolis Star and Tribune* case, it appears that the press was the only party subject to the tax. The same is true in *Globe Newspaper Co. v. Commissioner of Revenue, supra*. The statute in the instant case denies the tax exemption to not only printing or publishing firms, but also other businesses, such as mining, gas and oil exploration, restaurants, and utilities. While there is some dispute concerning the applicability to other groups, both sides concede that the exception also applies to the restaurant industry. We are

unwilling to rule that the statute on its face as a matter of law impermissibly singles out the printing industry. No proof has been presented concerning the size or the impact on the other parties who are denied the exemption. On the record before us, we, therefore, decline to find that the trial court erred in determining that the statute did not violate the First Amendment.

We also find appellant's equal protection argument to be unpersuasive. In *Eastern Air Lines, Inc. v. Department of Revenue*, 455 So. 2d 311 (Fla. 1994), the Supreme Court addressed the appropriate test in determining whether the classification in a taxing statute is subject to a challenge based on equal protection.

In *Leathers, supra*, it was determined that subjecting one portion of the media to a tax while exempting another portion was not necessarily invalid. *See also Reiters America, Inc. v. Sharp*, 889 S.W.2d 646 (Tex. Ct. App. 1994). States are given great latitude in making the tax classifications, and the burden is very heavy on one who seeks to overturn such a classification. *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 60 S. Ct. 406, 84 L. Ed. 590 (1940). The most direct explication of this standard is found in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337, 55 L. Ed. 309 (1910), in which the Supreme Court held,

> When the classification in such a law is called in question, *if any state of facts reasonably can be conceived that would sustain it*, the existence of *that state of facts at the time the law was enacted must be assumed*.

(Emphasis added).

Under this analysis, sections 212.08(5)(b)1., 2., and 5., Florida Statutes, fully meet equal protection standards. The Legislature could well have determined that certain businesses offered special advantages or benefits to Florida such as job creation, increased spending in local communities, improvement to quality of life in Florida, acting as a magnet to draw other businesses to Florida, or increasing tourist travel to Florida.

These would all be rational grounds for a decision to relieve a company of the imposition of the tax. The Legislature could also well have determined that printers did not offer a particular advantage or benefit to Florida, or that any benefit obtained would not offset the loss of revenue caused by an exemption. For example, a modern printing plant such as Donnelley's requires a large investment in machinery, but is highly automated. The Legislature could well have determined that this state of facts did not warrant extending the exemption to printing or publishing firms. In addition, printers, unlike other members of the media, produce tangible personal products. Thus, other media, such as radio and television, would not be eligible for the sales tax exemption contained in sections 212.08(5)(b)1. and 2. for they do not produce tangible personal products. The Legislature could have determined that one segment of the media should not receive preferential treatment. Thus, the Legislature's decision to exclude printers or publishers from the exemption contained in sections 212.08(5)(b)1. and 2., Florida Statutes, has a conceivable rational basis and does not violate the Equal Protection Clauses of the Florida and United States Constitutions.

MINER and VAN NORTWICK, JJ., concur.

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, FLORIDA

Case No. 93-4780
CIVIL DIVISION

R.R. DONNELLEY & SONS COMPANY,

Plaintiff,

vs.

LAWRENCE H. FUCHS,
Executive Director,
Department of Revenue of
the State of Florida; and
DEPARTMENT OF REVENUE OF
THE STATE OF FLORIDA,

Defendants.

_____/

FINAL JUDGMENT

THIS CAUSE came before the Court for final hearing, and the Court having considered the parties' stipulation of facts and memoranda of law and having heard argument of counsel for the respective parties, and being otherwise fully advised in the premises,

FINDS AND DECIDES as follows:

The uncontroverted facts in this case show that the plaintiff, R.R. Donnelley & Sons Company, is a large commercial printing firm with several printing plants throughout the United States and abroad. In 1990, the plaintiff acquired a site in Florida for the purpose of establishing its first printing operation in Florida. In preparation for the start-up of its Florida plant, the plaintiff purchased printing presses and other capital equipment and machinery for its new operation, at a cost of approximately $30

million. The plaintiff began operation at its Florida printing location in June of 1991.

On February 11, 1991, the plaintiff applied for the statutory exemption from sales tax for equipment purchases for new and expanding businesses, provided for by Section 212.08(5)(b), Florida Statutes. However, in March, 1991, the application was denied by the Department of Revenue, pursuant to Section 212.08(5)(b)5., Florida Statutes. Section 212.08(5)(b)5. specifically excludes certain businesses, including "printing or publishing firms," from eligibility for the sales tax exemption for equipment purchases. The plaintiff's application for a refund of the $1.8 million in sales tax paid on the equipment purchases was likewise denied by the Department in September, 1993. It is undisputed that at least some of the plaintiff's machinery and equipment purchases for the start-up of the Florida plant would have qualified for the sales tax exemption under Section 212.08(5)(b) 1., but for the exception for printing and publishing firms provided in Section 212.08(5)(b)5.

In 1993, the plaintiff purchased additional machinery and equipment in connection with its expansion of the Florida plant. Under the Department's application and interpretation of Section 212.08(5)(b)2., as limited by Section 212.08(5)(b)5, these purchases are also subject to sales tax.

Through its amended complaint, the plaintiff seeks a declaration by this court that Section 212.08(5)(b)5., Florida Statutes is an unconstitutional infringement upon the freedom of the press and denies the plaintiff equal protection under the laws by discriminating against print media. These alleged constitutional deprivations are the basis for the plaintiff's claim, under 42 U.S.C. § 1983, that the Director of the Department is liable to the plaintiff for a refund of the sales taxes paid by the plaintiff. The plaintiff also seeks attorney's fees under 42 U.S.C. § 1988. Alternatively, the plaintiff seeks a declaration that the statutory exception to the exemption from sales tax does not apply to the plaintiff because Donnelley is engaged only in printing, not printing *and* publishing. Finally, the plaintiff seeks to compel the

Department to determine the amount of the refund due to the plaintiff for the illegally or unconstitutionally imposed taxes.

Sections 212.08(5)(b)1. and (5)(b)2., Florida Statutes, provide for a refund of taxes paid for the purchase of machinery and equipment used to start an operation which manufactures taxable personal property for sale and a partial refund of taxes paid for the purchase of machinery and equipment used to expand a business which manufactures taxable personal property for sale. The plaintiff was found ineligible for this refund by the Department, based upon Section 212.08(5)(b)5., Florida Statutes. That section provides:

> The exemptions provided in subparagraphs 1. and 2. do not apply to machinery or equipment purchased or used by electric utility companies, communications companies, phosphate or other solid minerals severance, mining or processing operations, oil or gas exploration or production operations, *printing or publishing firms*, any firm subject to regulation by the Division of Hotels and Restaurants of the Department of Business Regulation, or any firm which does not manufacture, process, compound, or produce for sale . . . items of tangible personal property.

(emphasis added).

The court rejects the Plaintiff's argument that the exception should be construed to apply only to firms which both print and publish, and therefore construed not to apply to the Plaintiff's printing firm. The phrase "printing or publishing firms" clearly applies to firms which print or publish, just as the other named businesses include oil exploration or production, gas exploration or production, phosphate mining, phosphate processing, other solid minerals mining, etc. The use of "or" in this case is not ambiguous and is therefore not subject to judicial construction.

The fact that the exception to the tax exemption in section 212.08(5)(b)5. subjects the plaintiff and other printing firms to Florida sales tax does not automatically render the exception an unconstitutional abridgement of the freedom of the press.

Florida's sales tax "is a tax of general applicability, which applies to receipts from the sales of all tangible personal property unless specifically exempted, and does not single out the press for special treatment." *Dept. of Revenue v. Magazine Publishers of America*, 604 So.2d 459, 461 (Fla. 1992). Even if, as the plaintiff argues, the exception results in different treatment between printers and other businesses, or between print media and other types of media such as television or radio companies, constitutional suspicions are raised only in certain circumstances.

Differential taxation of first amendment speakers is constitutionally suspect when it threatens to suppress the expression of particular ideas or viewpoints by (1) singling out the press, (2) targeting a small group of speakers, or (3) discriminating on the basis of content of the speech. *Leathers v. Medlock*, 499 U.S. 439, 111 S. Ct. 1438, 113 L. Ed.2d 494 (1991). Under these circumstances, the government must show a compelling justification for the exercise of its taxing power in the manner challenged. However, if these circumstances are not present, the government's exercise of its taxing power is presumed to be constitutional, and this presumption can be overcome "only by the most explicit demonstration that a classification is hostile and oppressive discrimination against particular persons and classes." *Leathers v. Medlock*, 113 L. Ed.2d 494 at 507 (citations omitted). In *Leathers v. Medlock*, the court found that rather than triggering the heightened scrutiny requiring the showing of a compelling justification by the State, the statute in question merely codified the Legislature's choice to exempt or exclude certain media from a generally applicable tax. The court found no indication that the statute was passed with the intent to censor expressive activities or that it was likely to "stifle the free exchange of ideas." 113 L. Ed.2d at 508. The court concluded that the tax on cable and satellite services, from which print media were exempt, did not violate the First Amendment.

In this case, it is clear that Section 212.08(5)(b)5. does not discriminate based on content, either directly or indirectly. *Compare, Dept. of Revenue v. Magazine Publishers of America*, 604 So.2d 459 (Fla. 1992). Likewise, it was not shown that the

exception applies only to a limited group of publishers, as was the case in *Minnesota Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed 2d 295 (1983). Therefore, in order to subject the exception to the strict scrutiny requiring a showing by the State of a compelling government interest, the plaintiff must show that the exception singles out the press for special treatment.

The plaintiff argues that the exception singles out the press because, although electric utility, communications, certain mining and production, and a few other types of businesses are specifically excepted from the tax exemption, the other businesses do not qualify for or do not need the exemption. Rather, it is the plaintiff's position that they are listed merely as a pretense to cover the singling out of the press for liability for sales tax on the purchase of equipment and machinery for a new or expanding business.

The court finds that the limitation on the exemption from certain sales and use taxes at issue here does not single out the press for special treatment. The exception does not compare to the special use tax imposed upon ink and paper used in publications in the case of *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 103 S. Ct. 1365, 75 L. Ed.2d 295 (1983) or the tax imposed upon the advertising receipts of publications with circulations over 20,000, which applied to only 13 of over 130 newspapers in the State of Louisiana, in *Grosjean v. American Press Co.*, 297 U.S. 233, 56 S. Ct. 444, 80 L. Ed. 660 (1936). As previously noted, the application of Florida's sales tax to printers and publishers does not constitute a singling out of the press for special treatment. *Dept. of Revenue v. Magazine Publishers of America*, 604 So.2d 459 (Fla. 1992). There is no evidence whatsoever that the exception threatens the free exchange of ideas or hinders the press as a First Amendment speaker. The exception to the exemption is not the imposition of a special tax, but merely a legislative limitation on an exemption from the generally applicable tax.

Because the exception does not single out the press, the statute in question is presumed to be constitutional absent "an additional basis" to support a finding that the statute violates the First Amendment. *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 233, 107 S. Ct. 1722, 95 L. Ed.2d 209 (1987). There has been no such additional basis shown in this case. The exception to the exemption is applied without reference to the content of the speech printed or published. There has been no demonstration that the exception was intended to suppress any ideas or that it actually has that effect. No evidence supports a finding that the exception was a deliberate device to penalize a certain group of printers or publishers. It can only be concluded that the selection of printing and publishing firms as one of the businesses excepted from the tax exemption was a matter of legislative policy and discretion. *See, Leathers v. Medlock, supra*, 113 L. Ed.2d at 507. The court finds no First Amendment violation in Section 212.08(5)(b)5., Florida Statutes.

The exception to the exemption does not violate the Plaintiff's right to equal protection under the laws. All printing firms and publishing firms are treated equally under the exception. In addition, the exception does not treat non-print media members differently that print-media members because the exception for new machinery applies only to producers of tangible personal property. The record in this case shows that no other media companies receive the exception. The plaintiff has not shown that the failure by the State to treat every new or expanding business, regardless of size, volume of business, nature of product, or other factors, equally with regard to the tax exemption is a hostile and oppressive discrimination. Therefore, the court finds no violation of equal protection requirements in the exception of printing firms and publishing firms from the sales tax exemption. *See Eastern Airlines, Inc. v. Dept. of Revenue*, 455 So.2d 311 (Fla. 1984).

Because the Court finds no constitutional infirmity in the exception challenged here, it need not address the Plaintiff's claim under 42 U.S.C Section 1983, or the Department's defenses thereto.

WHEREFORE, based on the foregoing, it is hereby ORDERED AND ADJUDGED that:

1. Sections 212.08(5)(b)1., (5)(b)2., and (5)(b)5., Florida Statutes, do not abridge freedom of speech or of the press, and therefore do not violate the Plaintiff's constitutional rights under the First Amendment to the United States Constitution or Article I, Section 4, of the Florida Constitution.

2. Sections 212.08(5)(b)1., (5)(b)2., and (5)(b)5., Florida Statutes, do not deny the Plaintiff equal protection of the laws under the Fourteenth Amendment to the United States Constitution and Article I, Section 2, of the Florida Constitution.

3. The Department of Revenue's denial of Plaintiff's application for refund of its purchases of machinery and equipment for its initial establishment of its printing operation in Florida pursuant to Section 212.08(5)(b), Florida Statutes, is upheld.

4. Because Plaintiff is not eligible for the refund it sought, it is declared that Plaintiff is likewise not entitled to a refund for taxes paid for its purchase of machinery and equipment and to expand its printing operation in Florida.

It is, therefore, ORDERED AND ADJUDGED that Plaintiff, R.R. DONNELLEY & SONS COMPANY, shall take nothing by its complaint, and the Defendants, LAWRENCE H. FUCHS, Executive Director, Department of Revenue of the State of Florida, and DEPARTMENT OF REVENUE OF THE STATE OF FLORIDA, shall go hence without day.

DONE AND ORDERED in Chambers, at Tallahassee, Leon County, Florida, this 9th day of February, 1995.

/s/L. Ralph Smith, Jr.
L. RALPH SMITH, JR.
Circuit Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FLORIDA STATUTES: TAXATION AND FINANCE

212.05. Sales, storage, use tax

It is hereby declared to be the legislative intent that every person is exercising a taxable privilege who engages in the business of selling tangible personal property at retail in this state, including the business of making mail order sales, or who rents or furnishes any of the things or services taxable under this chapter, or who stores for use or consumption in this state any item or article of tangible personal property as defined herein and who leases or rents such property within the state.

(1) For the exercise of such privilege, a tax is levied on each taxable transaction or incident, which tax is due and payable as follows:

(a)1. a. At the rate of 6 percent of the sales price of each item or article of tangible personal property when sold at retail in this state, computed on each taxable sale for the purpose of remitting the amount of tax due the state, and including each and every retail sale.

* * * *

(b) At the rate of 6 percent of the cost price of each item or article of tangible personal property when the same is not sold but is used, consumed, distributed, or stored for use or consumption in this state.

* * * *

212.08. Sales, rental, use, consumption, distribution, and storage tax; specified exemptions

The sale at retail, the rental, the use, the consumption, the distribution, and the storage to be used or consumed in this state of the following are hereby specifically exempt from the tax imposed by this part.

* * * *

(5) Exemptions; account of use.—

* * * *

(b) *Machinery and equipment used to increase productive output.—*

1. Industrial machinery and equipment purchased for use in new businesses which manufacture, process, compound, or produce for sale, or for exclusive use in spaceport activities as defined in s. 212.02, items of tangible personal property at fixed locations are exempt from the tax imposed by this chapter upon an affirmative showing by the taxpayer to the satisfaction of the department that such items are used in a new business in this state. Such purchases must be made prior to the date the business first begins its productive operations, and delivery of the purchased item must be made within 12 months of that date.

2. Industrial machinery and equipment purchased for use in expanding manufacturing facilities or plant units which manufacture, process, compound, or produce for sale, or for exclusive use in spaceport activities as defined in s. 212.02, items of tangible personal property at fixed locations in this state are exempt from any amount of tax imposed by this chapter in excess of $100,000 per calendar year upon an affirmative showing by the taxpayer to the satisfaction of the department that such items are used to increase the productive output of such expanded business by not less than 10 percent.

* * * *

5. The exemptions provided in subparagraphs 1. and 2. do not apply to machinery or equipment purchased or used by electric utility companies, communications companies, phosphate or other solid mineral severance, mining, or processing operations, oil or gas exploration or production operations,

printing or publishing firms, any firm subject to regulation by the Division of Hotels and Restaurants of the Department of Business and Professional Regulation, or any firm which does not manufacture, process, compound, or produce for sale, or for exclusive use in spaceport activities as defined in s. 212.02, items of tangible personal property.

* * * *

(2)

Supreme Court, U.S.
FILED
OCT 25 1996
CLERK

No. 96-516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

R.R. DONNELLEY & SONS COMPANY,
Petitioner,

v.

LAWRENCE H. FUCHS, Executive Director of the Department of Revenue of the State of Florida, and DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

SUPPLEMENTAL BRIEF OF PETITIONER

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SUPPLEMENTAL BRIEF OF PETITIONER

Pursuant to Rule 15.8 of the Rules of this Court, petitioner R.R. Donnelley & Sons Company ("Donnelley") submits this Supplemental Brief to inform the Court that Fla. Stats. § 212.08(5)(b)5, the principal provision at issue in this case, has been amended since the decision of the Court of Appeal below. As recently amended, § 212.08(5)(b)5 no longer excludes "printing" firms, such as petitioner, from the statutory exemption from the state sales and use tax on the purchase of new equipment. The statute continues to deny the tax exemption, however, to "publishing firms that do not export at least 50 percent of their finished product out of the state." Fla. Stats. § 212.08(5)(b)5.

The amendments to § 212.08(5)(b)5 became effective on July 1, 1996, and thus have no application to this case, which involves a nearly two million dollar tax on petitioner's purchases of equipment in 1990 and 1993. *See, e.g., Hausman v. VTSI, Inc.*, 482 So. 2d 428, 430 (Fla. Ct. App. 1985) ("[t]ax statutes . . . operate only prospectively unless legislative intent to the contrary clearly appears") (citing *State v. Green*, 101 So. 2d 805 (Fla. 1958)).

The amended version of § 212.08(5)(b)5 is reprinted in the appendix to this Brief.

Respectfully submitted,

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October 25, 1996

APPENDIX

RELEVANT FLORIDA SESSION LAW

1996 REGULAR SESSION **Ch. 96-320, § 15**

Section 15. Paragraph (b) of subsection (5) . . . of section 212.08, Florida Statutes, [is] amended . . . to read:

212.08. Sales, rental, use, consumption, distribution, and storage tax; specified exemptions

The sale at retail, the rental, the use, the consumption, the distribution, and the storage to be used or consumed in this state of the following are hereby specifically exempt from the tax imposed by this part.

(5) EXEMPTIONS; ACCOUNT OF USE.—

(b) Machinery and equipment used to increase productive output.—

1. Industrial machinery and equipment purchased for use in new businesses which manufacture, process, compound, or produce for sale, or for exclusive use in spaceport activities as defined in s. 212.02, items of tangible personal property at fixed locations are exempt from the tax imposed by this chapter upon an affirmative showing by the taxpayer to the satisfaction of the department that such items are used in a new business in this state. Such purchases must be made prior to the date the business first begins its productive operations, and delivery of the purchased item must be made within 12 months of that date.

2. Industrial machinery and equipment purchased for use in expanding manufacturing facilities or plant units which manufacture, process, compound, or produce for sale, or for exclusive use in spaceport activities as defined in s. 212.02, items of tangible personal property at fixed locations in this state are exempt from any amount of tax imposed by this chapter in excess

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Additions are indicated by underline; deletions by ~~strikeout~~.

of $50,000 ~~$100,000~~ per calendar year upon an affirmative showing by the taxpayer to the satisfaction of the department that such items are used to increase the productive output of such expanded business by not less than 10 percent.

* * * *

5. The exemptions provided in subparagraphs 1. and 2. do not apply to machinery or equipment purchased or used by electric utility companies, communications companies, phosphate or other solid minerals severance, mining, or processing operations, oil or gas exploration or production operations, ~~printing or~~ publishing firms that do not export at least 50 percent of their finished product out of the state, any firm subject to regulation by the Division of Hotels and Restaurants of the Department of Business and Professional Regulation, or any firm which does not manufacture, process, compound, or produce for sale, or for exclusive use in spaceport activities as defined in s. 212.02, items of tangible personal property.

MOTION FILED

OCT 30 1996

(3)

No. 96-516

In the Supreme Court of the United States

OCTOBER TERM, 1996

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Respondents

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

MOTION OF THE NEWSPAPER ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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24 pp

In the Supreme Court of the United States

OCTOBER TERM, 1996

No. 96-516

R.R. DONNELLEY & SONS COMPANY,
Petitioner

v.

LAWRENCE H. FUCHS, Executive Director of the Department of Revenue of the State of Florida, and DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Respondents

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

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MOTION OF THE NEWSPAPER ASSOCIATION OF AMERICA FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Pursuant to Rule 37.2 of the Rules of this Court, The Newspaper Association of America ("NAA") requests leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari. Counsel for petitioner has consented to the filing of this brief, but counsel for respondent has declined to give his consent.

NAA is a nonprofit organization representing the interests of more than 1,600 newspapers, 57 of which publish throughout the State of Florida. NAA members account for approximately 87 percent of the daily newspaper circulation in the United States.

As this Court recognized in *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983),

a State tax scheme that subjects the press to special or unequal burdens threatens First Amendment freedoms, whether or not it is possible to prove that hostility toward the press motivated the legislature to adopt the tax structure. NAA's predecessor, the American Newspaper Publishers Association, participated in *Minneapolis Star* as *amicus curiae* supporting the analysis and result adopted by the Court.

The certiorari petition filed by R.R. Donnelley and now before the Court raises a similar issue of considerable importance to newspaper publishers in Florida and throughout the country. Florida allows virtually all manufacturers of goods to seek an exemption from taxes on capital purchases, *except* "printing or publishing firms," which are expressly denied eligibility for the exemption. Fla. Stat. Ann. 212.08(5)(b)5. Florida's tax scheme, like the one that this Court held unconstitutional in *Minneapolis Star*, thereby impermissibly "singl[es] out publications" to pay a substantial tax from which all other manufacturers of retail goods can be exempted. 460 U.S. at 581.

This discriminatory tax threatens core First Amendment values that are of special concern to NAA members, who have both financial and policy interests in the proper resolution of the issues before the Court. Additionally, by singling out newspaper printers and publishers to pay substantial taxes on printing press purchases, the tax directly threatens the economic well-being of NAA's Florida members.

NAA can provide the Court with a broader context for assessing the importance of the issues posed by the petition for a writ of certiorari.

For the foregoing reasons, the Court should grant the motion of NAA to file the accompanying brief as *amicus curiae* in support of the petition.

Respectfully submitted.

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BRIEF FOR THE NEWSPAPER ASSOCIATION OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICUS CURIAE*

The interest of the Newspaper Association of America as *amicus curiae* is described in the preceding motion for leave to file this brief.

SUMMARY OF ARGUMENT

Florida permits virtually all manufacturers of retail goods to seek an exemption from taxes on certain capital investments, *except* "printing or publishing firms," which are expressly denied the exemption. Fla. Stat. Ann. 212.08(5)(b)5. Florida's tax scheme, like the one that this Court held unconstitutional in *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575, 581

(1983), thereby impermissibly "singl[es] out publications" to bear a substantial tax burden. This Court repeatedly has held that such differential tax burdens, targeted at the press, are "presumptively unconstitutional" and subject to strict scrutiny. *Id.* at 585; accord *Leathers* v. *Medlock*, 499 U.S. 439, 447 (1991).

The Florida appellate court nevertheless held that Florida's tax scheme need be supported only by a "conceivable rational basis," and on that reasoning, upheld the statute. Pet. App. 4a-5a. In so doing, the court below severely misinterpreted this Court's decision in *Leathers*, *supra*, and dramatically constricted the scope of the First Amendment protection of freedom of the press. The Florida appellate court's decision will impose severe economic burdens on Florida publishers and printers, many of whom are members of the amicus Newspaper Association of America, interfering with their ability to maintain viable businesses. This Court should accept the Florida court's explicit request for further guidance and grant further review.

ARGUMENT

I. ANY TAX SCHEME THAT IMPOSES SPECIAL TAX BURDENS ON PUBLISHERS VIOLATES THE FIRST AMENDMENT PROTECTIONS OF FREE SPEECH AND FREE PRESS.

Sixty years ago the Court struck down a discriminatory State tax on the press, relying on the First Amendment's profound and abiding principle that "an untrammeled press [is] a vital source of public information" and that selective taxation endangers the flow of this information. *Grosjean* v. *American Press Co.*, 297 U.S. 233, 250 (1936).

In *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983), the Court extended this principle to nullify a State use tax on large purchases of ink and paper, the staples of newspaper publishing. The State's tax scheme, like the Florida tax

scheme that petitioner is challenging, denied to publishers a tax exemption available to all other manufacturers of goods for retail. *Id.* at 582. This Court held that such "*differential treatment*" of newspaper publishers is "presumptively unconstitutional" and must fall, unless the State establishes "a counterbalancing interest of compelling importance that it cannot achieve without differential taxation." *Id.* at 585 (emphasis added).

Some commentators optimistically predicted that the "bright-line standard" the Court created in *Minneapolis Star*, which "provides clear guidance for legislatures and lower courts," would guarantee that the press would "remain unthreatened by future inequitable taxation." Robert M. Cover, *The Supreme Court, 1982 Term*, 97 HARV. L. REV. 1, 177 (1983). Unfortunately, however, as this case demonstrates, not all the States have gotten the message. Consequently, it has been necessary for the Court to step in from time to time to reenforce or clarify the governing principles.

Thus, for example, in *Arkansas Writers' Project* v. *Ragland*, 481 U.S. 221 (1987), the Court invalidated an Arkansas sales tax scheme that subjected general interest magazines to the sales tax, while exempting other kinds of publications, including professional, trade and sports journals. The Court rejected the State's argument that the tax could survive because it applied to most kinds of businesses and thus did not "single out" the press. The fatal flaw was that, by exempting some magazines from the tax while subjecting others to it, the State unconstitutionally discriminated against a subclass of the press, treating "some magazines less favorably than others." *Id.* at 229.[1]

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[1] The Court reached a similar result in *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989), concluding that the Establishment Clause barred Texas from imposing a sales tax on all periodical publications, except those published by a religious faith and sacred

Most recently, the Court upheld Arkansas' extension of its general "gross receipts tax" to cable television systems, despite the State's retention of an exemption from the tax for newspapers and magazines. *Leathers* v. *Medlock*, 499 U.S. 439 (1991). The Court reaffirmed its holdings in *Minneapolis Star* and *Grosjean* that "differential taxation of First Amendment speakers is constitutionally suspect" in at least three situations: (1) if it "single[s] out the press"; (2) "if it targets a small group of speakers"; or (3) "if it discriminates on the basis of the content of taxpayer speech." *Id.* at 447. Since Arkansas had simply included cable operators within the large majority of businesses subject to the tax, the Court found that application of the tax neither improperly singled out the media as distinguished from other businesses, nor "target[ed] a narrow group to bear fully the burden of the tax." *Id.* at 448. Further, after careful analysis, the Court was satisfied that the disparate tax treatment of different types of media did not suggest an intent to discriminate on the basis of content. *Id.* at 449-450.

Even though the Court has repeatedly reaffirmed the *Grosjean-Minneapolis Star* doctrine, some of the States remain insensitive to the constitutional command to tread carefully when treating the press differently from other taxpayers. For example, when Massachusetts sought to enforce a state law denying newspaper publishers a tax exemption available to other manufacturers for the purchase of machinery and materials — much like the Florida statute at issue here — the Supreme Judicial Court had to intervene to strike down the law. *Globe Newspaper Co.* v. *Commissioner of Revenue*, 571 N.E.2d 617 (Mass. 1991). In the present case, however, the Florida courts failed to correct the Florida legislature's disregard for the *Grosjean-Minneapolis Star* doctrine.

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to that faith.

II. THE FLORIDA TAX ON NEW CAPITAL INVESTMENT IN PRINTING PRESSES AND OTHER PUBLISHING EQUIPMENT DISCRIMINATORILY BURDENS NEWSPAPER PUBLISHERS AND PRINTERS, TARGETING THEM ALONE AMONG ALL MANUFACTURERS OF RETAIL PRODUCTS.

Although the press is not immune from the ordinary burdens of taxes of general applicability, the Florida tax structure challenged by petitioner leaves publishers of written communication the only manufacturers of goods subject to the tax on new capital investments. The Florida scheme exempts from the 6% sales tax on capital equipment all manufacturers of "tangible personal property," *except* "printing or publishing firms" and several other business categories, such as mining companies, gas and oil exploration companies, and restaurants. Fla. Stat. Ann. 212.08(5)(b)5.

The State, however, did not dispute (Pet. 5 & n.3), and the courts below appear to have assumed (Pet. App. 6a-7a, 13a), that, with the possible exception of the restaurant industry, all of the other business categories purportedly excepted from the exemption along with printers and publishers either could not qualify for the exemption for other reasons or did not need the tax exemption in the first place.[2] Thus, the only *manufacturers* of tangible personal property to which the State denies the exemption are printing and publishing companies. Indeed, the only *businesses* of any

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[2] Most of these businesses are not manufacturers engaged in producing "tangible personal property," and thus would not be members of the class entitled to the exemption even absent their express exclusion. Pet. 5 & n.3 (citing deposition testimony of the designated witness from the State Department of Revenue). The other business category, electrical utility companies, already enjoys a separate statutory exemption from the tax, mooting its exclusion from this exemption. Fla. Stat. Ann. 212.08(5)(c).

sort that manufacture, compound, process, or produce tangible personal property to which the State denies the exemption are printing and publishing companies, and restaurants. Pet. App. 6a-7a, 13a; Fla. Stat. Ann. 212.08(5)(b)5.

The statute's plain terms therefore single out for differential and burdensome treatment those manufacturers that are involved in expression protected by the First Amendment. *Ibid.* Such targeting of the media for taxes that no other manufacturer of retail goods must pay is presumptively unconstitutional. *Minneapolis Star*, 460 U.S. at 585; *Leathers*, 499 U.S. at 446.

Florida's enumeration of other irrelevant categories of businesses that are ineligible for the exemption cannot insulate its tax statute from the strict scrutiny this Court traditionally applies to such press-specific tax burdens. If Florida's exercise in artful drafting were sufficient to evade strict scrutiny, the States would have a potent weapon for undermining the *Grosjean-Minneapolis Star* doctrine.

III. ACCEPTANCE OF THE ARGUMENTS ADVANCED TO JUSTIFY FLORIDA'S SCHEME WOULD UNDERMINE THE FIRST AMENDMENT'S GUARANTEE OF FREEDOM OF THE PRESS.

A. Since A Tax That Singles Out the Press Suggests An Improper Legislative Motive, the Tax Must Be Subjected To Strict Scrutiny.

The Florida courts below relied heavily on this Court's decision in *Leathers*, *supra*, to support their opinion that Florida's tax scheme need only be scrutinized for a "conceivable rational basis." Pet. App. 4a-5a, 7a, 8a, 12a, 14a. The courts fundamentally misconstrued *Leathers*. That decision stands only for the unremarkable proposition that differential tax classification of different forms of media, such

as cable service providers and newspapers, is not always inherently suspect. 499 U.S. at 449-450.

The *Leathers* Court, however, not only did not renounce, but actually reaffirmed the holding in *Minneapolis Star* that a targeted exclusion of publishers from a tax exemption, such as Florida's, is subject to strict scrutiny: "Absent a compelling justification, the government may not exercise its taxing power to single out the press." *Leathers*, 499 U.S. at 447 (citing *Grosjean*, 297 U.S. at 244-249; *Minneapolis Star*, 460 U.S. at 585); accord *id.* at 445-446.

This Court's observation in *Leathers* that differential taxation of different speakers "does not implicate the First Amendment unless the tax is directed at, or presents the danger of suppressing, particular ideas," must be understood in context. 499 U.S. at 453. As the Court had explained in *Minneapolis Star*, a tax that "single[s] out the press" for a unique tax burden does suggest that the tax is directed at suppressing particular ideas. Such "differential treatment, unless justified by some special characteristic of the press, suggests that the goal of the regulation is not unrelated to suppression of expression, and such a goal is presumptively unconstitutional." *Minneapolis Star*, 460 U.S. at 585.

The lower courts failed to recognize this critical distinction between this case and *Leathers*: Unlike the taxes challenged in *Minneapolis Star* and the present case, the tax at issue in *Leathers* did not "single[ ] out the press" for a unique tax burden. *Ibid.* Instead, the tax there "applie[d] to receipts from the sale of all tangible personal property and a broad range of services." *Leathers,* 499 U.S. at 447 (listing the numerous business categories subject to the tax). In fact, the comprehensive tax at issue in *Leathers* actually exempted the print media from its burdens.

In contrast, Florida's tax structure offers all manufacturers of goods an exemption from taxation of capital equipment purchases — *except* publishers and printers. Such

differential treatment warrants strict scrutiny because it raises the suspicion that it is a "purposeful attempt to interfere" with the press's "unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion." *Leathers*, 499 U.S. at 447.

Under the controlling decisions, though, it is the mere *risk* that the differential classifications may reflect the legislature's punitive or deterrent intent that suffices to treat the differential tax as presumptively unconstitutional, and to subject the tax to strict scrutiny. It is not necessary to prove that improper motives actually animated the differential treatment. The Court expressly held in *Minneapolis Star* that proof of "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." 460 U.S. at 592. In *Leathers* the Court explicitly reaffirmed that principle: "*Minneapolis Star* resolved any doubts about whether direct evidence of improper censorial motive is required in order to invalidate a differential tax on First Amendment grounds." 499 U.S. at 445.

There is ample reason to view Florida's approach as presenting at least a risk of improper motivation. History and practice illustrate why the courts should be especially skeptical about politically fashioned distinctions that either impose special taxes on the print media or deny them generally available exemptions. Newspapers and magazines generally cover political issues in more depth than the electronic media. Newspapers provide more critical editorial commentary about public officials and their policies than do the electronic media. So too, newspapers have a more extensive record of searching investigative journalism. Thus, especially at the State and local level, where public officials can most easily contrive burdensome tax regimes, newspapers are an especially inviting target for political retaliation and punitive exaction.

The Florida appellate court, therefore, misinterpreted *Leathers* as authorizing even those differential tax classifications that "single out the press" from all similarly situated businesses, so long as the classification may have any conceivable rational basis. Pet. App. 7a-8a, 12a, 14a. If adopted by other courts, this misinterpretation would dramatically constrict the traditional scope of the First Amendment protection of freedom of the press. Review of the Florida appellate court decision by this Court is necessary to correct that serious error.

B. The Purported Justifications for the Differential Tax Burdens on the Press Are Constitutionally Inadequate.

The trial court in this case declined to apply strict scrutiny for the palpably erroneous reason that the "exception to the exemption is not the imposition of a special tax [on the press], but merely a legislative limitation on an exemption from the generally applicable tax." Pet. App. 13a. This Court has made clear, however, that a discriminatory denial of a tax exemption is just as unconstitutional as a discriminatory affirmative tax. *Minneapolis Star*, 460 U.S. at 583 n.5 (rejecting the State's argument "that the press cannot successfully challenge regulations on the basis of the exemption of other enterprises").

The appellate court sidestepped the trial court's facile approach, recognizing that the critical inquiry is whether the State scheme singles out the press for a special burden, regardless of whether it is imposed through a general tax or exclusion from an otherwise applicable exemption. In its view, though, "[l]ittle guidance is provided in either the case law or the record in front of us as to when the group of people [subject to the tax] is so small [that the tax] constitutes differential treatment of the press." Pet. App. 6a. If the lower courts need more "guidance" to recognize that a universe of one (the print media) or two (print media and restaurants) is small enough to trigger strict scrutiny, then

that is all the more reason for this Court to grant certiorari to provide that guidance.

The Florida appellate court also opined that the legislature would be justified in withholding the exemption from printers and publishers because a "large investment" in facilities to build or expand "a modern printing plant" involves a "highly automated" process. Pet. App. 8a. The implication appears to be that it is appropriate to subject publishers to a tax from which every other manufacturer of goods is exempt, simply because the publishers have determined that their competitive health, if not indeed their survival, depends upon a reduction in labor costs.

This "justification" for the discriminatory tax, however, cannot be squared with the obvious purpose of providing manufacturers with a tax exemption for the purchase of new manufacturing equipment. This program encourages those manufacturers entitled to the exemption to modernize their operations, improve competitive efficiency, and secure the economic benefits of automation. It is therefore unlikely that Florida legislators denied publishers a tax exemption that encourages automation, because the legislators somehow disapproved of the publishers' own automation.

In the same vein, the court below speculated that the Florida legislature "could well have" denied printers and publishers the benefits of the tax exemption it made available to all other manufacturers because those manufacturers "offered special advantages or benefits to Florida such as * * * improvement to quality of life in Florida," whereas "printers [and publishers] did not offer a particular advantage or benefit to Florida." Pet. App. 7a-8a.

It is precisely that danger — that legislators exposed to the hot glare of the print media will decide that newspapers offer no particular benefit, and that the State would be better served by less media coverage — that first inspired this Court to interpret the Constitution as prohibiting differential taxation

of the media. See *Grosjean*, 297 U.S. at 250. Far from justifying deference to legislative prerogatives, as the Florida appellate court believed, (Pet. App. 8a), this suggested motivation for the differential tax warrants searching review.

In sum, the purported justifications for Florida's decision to deny the press the benefits of a generally available tax exemption do not withstand even cursory review. They surely do not hold up under the strict scrutiny required by *Grosjean*, *Minneapolis Star*, and *Leathers* for taxes that single out the print media for burdensome treatment.

Leaving the decision below in force, therefore, not only would deny Florida publishers the benefit of relief to which the First Amendment entitles them; it also would encourage other States to concoct equally flimsy "justifications" for forcing the press to shoulder selective and discriminatory taxes.

IV. NEWSPAPERS FACE INTENSE COMPETITIVE AND COST PRESSURES THAT RENDER THEM PARTICULARLY VULNERABLE TO THE KIND OF SUBSTANTIAL, DIFFERENTIAL TAX BURDEN FLORIDA HAS IMPOSED UPON THEIR CAPITAL INVESTMENTS.

For decades, newspapers have struggled to survive and to perform their important mission amidst increasing competition from other information sources, such as television and radio, and from other targets of advertising revenues, including magazines and direct mail marketing.[3] Meanwhile, increasing costs for labor and raw materials, especially

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[3] See, e.g., Monica Yant, *Tomorrow's Newspaper is Camera-Ready*, St. Petersburg Times, July 16, 1996, at 1A; Mark Fitzgerald, *A Year in Turmoil*, Editor & Publisher, Jan. 6, 1996, at 9.

newsprint, have put additional pressure on the viability of general circulation newspapers.[4]

As a result of these and other market forces, far fewer newspapers exist today than a decade ago,[5] and the circulation levels of existing newspapers are decreasing.[6] Additionally, in part as a result of the increasing costs of running a newspaper, the number of independent publishers has dramatically decreased in recent years.[7]

Indeed, Congress enacted the Newspaper Preservation Act, 15 U.S.C. 1801-1804, which grants newspaper companies certain exceptions to the antitrust laws, because it recognized the severe economic constraints under which newspapers operate and because it was concerned about newspapers' increasing vulnerability. See *Michigan Citizens for An Independent Press* v. *Thornburgh*, 868 F.2d 1285, 1288 (D.C. Cir.), *reh'g denied*, 868 F.2d 1300 (D.C. Cir.), *aff'd by an equally divided Court*, 493 U.S. 38 (1989); see also S. Rep. No. 91-535, at 38 (1969).

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[4] See, e.g., *A Year in Turmoil*, *supra*, note 3; Susannah Patton, *Family Newspapers Struggle to Hang On*, Wall St. J., Feb. 27, 1995, at A7; Mimi Whitefield, *Miami Herald Delays Pay Raises, Citing Newsprint Costs, Ad Revenue Shortfall*, Miami Herald, Mar. 23, 1996, at 1C; Robert Keefe, *Florida's Tampa Tribune Makes Changes in Regional News Section*, St. Petersburg Times, Feb. 1, 1996, at 1E.

[5] See, e.g., David B. Martens, *Special Report*, Presstime, May 1996, at 53; Michele Marchetti, *Extras! Extras!*, 148 Sales & Marketing Management 56 (Mar. 1, 1996).

[6] John Kirkpatrick, *Circulation Slips Nationwide: Higher Prices Among Factors Hurting Figures*, Dallas Morning News, May 1, 1996, at 2D.

[7] *Special Report*, *supra*, note 5; *Family Newspapers Struggle to Hang On*, *supra*, note 4.

Publishing a modern, competitive newspaper requires very heavy capital investment, especially for new presses. The average cost of a new printing press ranges from $16 million to $17 million. In this case, the 6% sales tax Florida imposed on petitioner's new presses and related capital equipment added $1.8 million to its purchase costs. Pet. App. 10a. This substantial 6% tax on publishers may materially affect their decisions whether and when to invest in new capital equipment to expand their circulation.

The burden of the tax may also deter aspiring publishers from opening new publishing companies, because the tax severely compounds the heavy start-up costs they already must confront. For publishers and aspiring publishers who proceed with the investments, the burden of the tax may be a significant disability in their endeavors to create or sustain a viable, healthy enterprise. The differential tax burden thus may hinder the successful expansion of existing publishers and thwart development of new publishing companies.

The *amicus* NAA has 57 members in Florida. To operate successfully and to reach the largest readership, NAA members must upgrade their facilities, including their presses, constantly. The constitutionality of Florida's decision to deny publishers an exemption for new capital equipment, available to all other manufacturers of goods, is of direct, substantial importance to NAA members and to publishers and readers generally.

V. FLORIDA'S RECENT AMENDMENTS TO ITS TAX EXEMPTION SCHEME SIMPLY EXACERBATE THE UNCONSTITUTIONAL SELECTIVITY.

After the decision below, the Florida legislature amended the statute in several respects, but those changes neither moot the petition nor cure the constitutional defects. See Fla. Stat. ch. 96-320 § 15 (1996).

First, the changes are purely prospective. They have no bearing on taxes paid or due, or on refunds refused, because

the printer or publisher was denied the benefit of an exemption unconstitutionally withheld under the prior version of the statute.

Second, while the amendment deletes the denial of the tax exemption to "printing" firms, the statute continues to deny the exemption to many "publishers." As recently amended, the statute challenged by petitioner, Section 212.08(5)(b)5, declares ineligible for the exemption all "publishing firms that do not export at least 50 percent of their finished product out of the state." Thus, on its face, the amended statute creates an even more suspect class of publishers who are to be denied the benefits of an exemption program for which almost every other manufacturer is eligible: publishers whose circulation is focused primarily within the State of Florida.

As discussed in Point III, *supra*, a tax scheme that singles out the press or a segment of the press for heavier burdens is presumptively unconstitutional, if there is any risk that the inequity flows from improper motives. The new distinctions that the Florida legislature has drawn thus frame this question: Why would a State choose to discriminate against *intrastate* commerce in ideas and expression?

One quite plausible explanation suggests the kind of risk that, according to cases from *Grosjean* to *Leathers*, the First Amendment shields newspaper publishers from having to confront -- a risk of official hostility to a vigorous and outspoken press. It is, after all, the State's local newspapers that are most likely to focus on local issues. Newspapers that circulate primarily within the State engage in the most intensive investigative journalism examining how well State and local officials are performing their duties.

Similarly, it is the State's local newspapers that most frequently use their editorial pages to criticize the policies of State and municipal officeholders and to endorse the candidacies of their challengers. It is precisely this

highlighting of in-State public issues that some public officials may find particularly nettlesome.

This Court wisely observed in *Leathers*:

> "The danger from a tax scheme that targets a small number of speakers is the danger of censorship; a tax on a small number of speakers runs the risk of affecting only a limited range of views. The risk is similar to that from content-based regulation: It will distort the market for ideas."

499 U.S. at 448.

Just as the $100,000 exemption from the paper and ink tax in *Minneapolis Star* unconstitutionally targeted large publishers for a discriminatory tax burden, Florida's amended statute improperly targets intrastate publishers, "tailor[ing] the tax so that it singles out a few members of the press." 460 U.S. at 592. Such targeting of a sliver of the publishing industry for a differential tax burden "presents such a potential for abuse that no interest suggested by [the State] can justify the scheme." *Ibid.*; accord *Leathers*, 499 U.S. at 447 ("A tax is also suspect if it targets a small group of speakers.").

Florida's new differential tax is, of course, not squarely before the Court, but it underscores our principal point: Despite *Grosjean*, *Minneapolis Star*, and *Leathers* — which reaffirmed the *Grosjean-Minneapolis Star* doctrine — States like Florida still do not fully appreciate the care the First Amendment requires them to use when they formulate tax measures that treat the press, or segments of the publishing industry, differently from other taxpayers.

To the extent that the court below believed that existing case law provides too "[l]ittle guidance" in determining whether an "exemption affects a group of people so small as to be considered singling out the press for special [adverse]

treatment" (Pet. App. 6a), that lament is a classic invitation for this Court to furnish the additional guidance.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

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MOTION FILED

OCT 3 1 1996

(4)

No. 96-516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

R. R. DONNELLEY & SONS COMPANY,
Petitioner,

v.

LAWRENCE H. FUCHS,
Executive Director of the Department of Revenue
of the State of Florida, and
DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal, First District of Florida

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF *AMICI CURIAE* PRINTING INDUSTRIES OF AMERICA AND PRINTING ASSOCIATION OF FLORIDA, INC. IN SUPPORT OF PETITIONER

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16 pp

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Respondents.

**On Petition for a Writ of Certiorari to the
District Court of Appeal,
First District of Florida**

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

COME NOW Printing Industries of America ("PIA") and the Printing Association of Florida, Inc. ("PAF"), and move the Court for leave to appear as *amici curiae* in support of the Petitioner, R.R. Donnelley & Sons Company ("Donnelley"), and in support of this motion state as follows:

1. Donnelley has consented in writing to the filing of an *amicus* brief by PIA and PAF, and Donnelley's consent has been filed with the Clerk of this Court.

2. Respondents, Lawrence H. Fuchs and the Department of Revenue of the State of Florida (together, the "Department"), will neither consent nor object to the

filing of this *amicus* brief. Rather, the Department has stated its intent to stand mute about the filing of the *amicus* brief.

3. PIA and PAF are large associations of printers nationwide and in the state of Florida, respectively. PIA and PAF seek to advance their members' interests, including their members' interests in remaining free from unlawful government infringement on the press, whether by taxation as in this case, or otherwise. PIA and PAF bring to the Court a broader spectrum of the printing industry than is represented by Donnelley alone.

4. The Florida tax statute at issue is particularly insidious because it provides states a simple means to circumvent the First Amendment and tax the press selectively, by merely adding a small token group to be taxed along with the press. The membership of PIA nationwide, and of PAF statewide, will be affected adversely if the Florida model is adopted in other states.

5. Because Donnelley has consented to this appearance by *amici*, and the Department has not objected to it, and because of the broad range of interests that PIA and PAF represent, PIA and PAF respectfully request leave to be heard on the issues presented in this case.

Respectfully submitted,

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October 31, 1996

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IN THE

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LAWRENCE H. FUCHS,
Executive Director of the Department of Revenue
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DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal, First District of Florida

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BRIEF OF *AMICI CURIAE* PRINTING INDUSTRIES OF AMERICA AND PRINTING ASSOCIATION OF FLORIDA, INC. IN SUPPORT OF PETITIONER

INTEREST OF THE *AMICI CURIAE*

Amici curiae Printing Industries of America ("PIA"), and Printing Association of Florida, Inc. ("PAF"), urge the Court to grant the Petition for a Writ of Certiorari filed by Petitioner, R.R. Donnelley & Sons Company ("Donnelley").[1] The Court should review this case because the

---

[1] Donnelley has consented in writing to the filing of this *amicus* brief, and Donnelley's consent has been filed with the Clerk of this Court. Respondents, Lawrence H. Fuchs and the Department of Revenue, State of Florida (together, the "Department"), neither

Florida court of last resort has decided an important question of federal law in a way that conflicts with relevant decisions of this Court and of another state court of last resort. The Florida court's decision approved a statutory tax scheme that, as applied, singled out printers and publishers for the payment of a sales and use tax on manufacturing equipment for new or expanding operations.

Amicus PIA is the world's largest graphic arts trade association, representing an industry with more than 990,000 employees and $116.3 billion in sales annually. PIA promotes the interests of nearly 14,000 member companies, which are members of one of 33 regional affiliate organizations throughout the United States and Canada. Many of PIA's members are commercial printers, allied graphic arts firms such as electronic imaging companies, equipment manufacturers, and suppliers. PIA promotes programs, services, and a business environment that help its members to operate profitably. It concentrates in the areas of government, industry research and statistical information, management education and publication, and technology information and assistance.

Amicus PAF is a not-for-profit association of more than 500 graphic arts companies in the state of Florida, including those actively engaged in the production of printing, and companies and individuals that furnish related materials, equipment, or services. PAF's members are also members of PIA. PAF provides programs, information, and services to positively impact the professional growth and profitability of its members. PAF's mission is to proactively seek out the proprietary information needs of the Florida graphic arts industry and respond with differentiated educational, regulatory, and legislative programs that demonstrably add value to its members and build synergy within the association.

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consent nor object to the filing of this brief. Accordingly, this brief is accompanied by a motion for leave to appear.

Statistics maintained by PIA reveal that commercial printing is the third largest manufacturing industry in the United States, and the largest industry in the state of Florida, with $86 million in graphic arts equipment and product produced in Florida in 1995. In 1995, Florida's graphic arts industry employed 75,000 people with an annual payroll of $2.1 billion and an average per capita salary of over $28,000 a year. Over 5,500 Florida graphic arts firms produced $8.8 billion in sales in 1995, continuing a trend of eight percent annual market growth since 1992.

PIA and PAF represent hundreds of businesses and individuals who are undoubtedly members of the press, and undoubtedly entitled to the protections of the First Amendment:

> The first amendment rights to freedom of speech and press exist not only because the authors of the Bill of Rights wished to humor the eccentricities of the man on the soap box but because they wished to secure forever the means of making the United States a free market place of ideas. *The human voice and the human pen are vital to this goal but no more vital than the physical printing press itself and the persons who operate it.* . . . Printing and publication may not rest on as strong an individual support as speech and authorship, but because without question printing and publication advance the rights of the people to know and understand they are not less deserving of protection than speech and authorship.
>
> * * * *
>
> [T]he ideal of free men governed by free men is just as dependent upon the vehicle of free speech—a free press. Not just the freedom to write one's own tract, print it in one's basement, and distribute it on the street corner is at stake but the freedom to go to a printer in the business of printing what comes over the counter, pay him, and have printed one's tract is at stake. The purpose of the first amendment was to

> protect the person who only operates the press as much as the author-printer, not so much because otherwise the commercial printer might lose money but because without the printer many an author could not disseminate his ideas. *Unless the mere printer has a right which is greater than that of the ordinary businessman, not only his self-interest will be harmed but the purpose of the first amendment will be defeated.*

Printing Indus. of the Gulf Coast v. Hill, 382 F. Supp. 801, 805, 806 (S.D. Tex. 1974) (emphasis added), *vacated on other grounds*, 422 U.S. 937 (1975). *See also, e.g., McIntyre v. Ohio Elections Comm'n*, 115 S. Ct. 1511, 1525 (1995) ("[T]he Framers . . . employed the term 'the press' to refer to the many independent printers who circulated small newspapers or published a writer's pamphlets for a fee.") (Thomas, J., concurring). *See Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987) (publishers entitled to First Amendment protections as members of the press); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 575 (1983) (same).

The printing and publishing industries cannot maintain their unique role in American society as the historical and continuing heart of the press, the voice of the people; and cannot maintain their economic stability and growth, if they are singled out for payment of a tax on one of their most expensive capital investments. The Florida sales and use tax statute required Petitioner Donnelley to pay nearly two million dollars more than a member of another industry would have paid for a similar capital equipment purchase. Such disparate treatment violates the First Amendment's guarantee that the law will afford the press the same treatment as similarly situated persons, and that the press will be free from any government infringement that is based on less than a compelling justification.

SUMMARY OF THE ARGUMENT

This Court should review the Florida court's decision because that decision conflicts with governing principles of constitutional law that this Court has established. Florida's selective denial of the sales and use tax exemption allows the state to accomplish indirectly what it could not accomplish directly: differential tax treatment of the press. The Florida court was too literal in holding that the state's denying one other group the exemption was sufficient to avoid a finding that the press was singled out. The classification of printers and publishers with restaurants is illogical and irrational both because these two groups have no relevant common characteristics, and because printers and publishers have much in common with other manufacturers but are treated differently. Thus, the coupling of printers and publishers with restaurants is insufficient to pass constitutional muster. The Court should review this case to resolve its conflict with controlling precedent of this Court.

ARGUMENT

The Florida tax statute at issue excepted printers and publishers from a sales and use tax exemption otherwise available to purchasers of capital equipment for new or expanding businesses. Fla. Stat. Ann. §§ 212.05(1)(a), (b); 212.08(5)(b)1-2,5 (1990).[2] Although the statute on its face listed several other categories of businesses not entitled to the sales and use tax exemption, Respondent Department of Revenue of the state of Florida ("Department") admitted that the businesses in all but one of these other categories were ineligible for the exemption for other reasons, either because they did not produce tangible

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[2] The statute was amended in 1996 to remove printers from the exception, leaving publishers as the only media group excepted from this exemption. The amended statute applies prospectively only, and therefore the 1996 amendment does not render this case moot or otherwise affect it. Fla. Stat. Ann. § 212.08(5)(b)5 (1996).

personal property, or because they had available to them a separate statutory exemption. Thus, these other categories of businesses were, without dispute, unaffected by their inclusion within the exception.

The Department admitted that the only other businesses listed in the exception and affected by it were restaurants, members of a non-manufacuring service industry. The Department further admitted that printers and publishers were the only manufacturers in Florida not entitled to the sales and use tax exemption. The Department offered no justification for this treatment of printers and publishers alone among manufacturers, arguing instead that because restaurants could qualify for the exemption but were also denied it, the press was not singled out for denial of a tax benefit. The Florida court adopted this reasoning, and in so doing violated this Court's precedents.

The Court should review this case to protect the press from states' continuing attempts to fashion creative means of circumventing the First Amendment. States have tried and failed to tax the press directly as in *Grosjean v. American Press Co.*, 297 U.S. 233 (1936); to tax its paper and ink as in *Minneapolis Star*; and to tax only part of the press as in *Arkansas Writers' Project*. The Florida statute at issue is a new twist on an old theme: even though on its face it lists other groups, its only significant impact is on the press. The Florida statute's inclusion of an unrelated business having only a minimal tax effect is a mere artifice, a token compliance with a literal interpretation of the First Amendment. To approve the artifice is to encourage continuing governmental inroads on freedom of the press. Whether motivated by anti-press animus or by "the persistent search for new subjects of taxation," *Grosjean*, 297 U.S. at 250, states will continue to target the printing and publishing industries for selective taxation as Florida did—unless this Court stops them.

I. SELECTIVE DENIAL OF AN EXEMPTION CAN, AND IN THIS CASE DOES, VIOLATE THE FIRST AMENDMENT.

The Florida court noted in passing the decisions of this Court and of a sister state court holding that the denial of an exemption can violate the First Amendment:

> In *Globe Newspaper Co. v. Commissioner of Revenue*, 571 N.E.2d 617 (Mass. 1991), the Court recognized that the denial of an exemption to a tax of general applicability may also result in a violation of the First Amendment if it singles out the press. *See also Speiser v. Randall*, 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed. 2d 1460 (1958), holding that a denial of a tax exemption may result in a First Amendment violation.

R.R. Donnelley & Sons Co. v. Fuchs, 670 So. 2d 113 (Fla. 1st DCA), *rev. denied*, 677 So. 2d 841 (Fla. 1996). Despite thus acknowledging that excluding the press from a tax exemption can give rise to a First Amendment claim, the Florida court failed to heed this Court's warning that the danger of selective exemption is that it can enable a state to accomplish indirectly what it cannot accomplish directly:

> [Government] may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech. For if the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to 'produce a result which it could not command directly.' Such interference with constitutional rights is impermissible. We have applied this general principle to denials of tax exemptions.

Perry v. Sindermann, 408 U.S. 593, 597 (1972) (citations omitted). Florida clearly could not permissibly im-

pose a special tax on the press, but it produced the same result indirectly through a selective exemption not extended to the press. The Court has never limited its denial-of-exemption precedents to cases in which literally only the press is denied the exemption, but rather has required "careful analysis of the particular circumstances" at issue to determine whether the effect of the denial inappropriately impacts the press. *Speiser*, 357 U.S. at 521. The "particular circumstances" of this case are compelling: the exemption at issue has no substantial impact on any group except the print media. Florida's denial of the tax exemption to printers and publishers amounts to an indirect singling out of the press that cannot withstand First Amendment scrutiny regardless of the fact that one other token group is denied the exemption.

II. DENYING ONE OTHER TOKEN GROUP THE EXEMPTION CANNOT SAVE THE TAX.

Taxing the press plus one other *de minimus* group—from another industry—cannot save the statute. The Court noted in *Minneapolis Star* that if exemption from a statute is the rule and not just an "isolated exception," the press is entitled to be treated in accordance with the rule and not the exception. *Minneapolis Star*, 460 U.S. at 583 n.5 (interpreting *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186 (1946)). Florida's sales and use tax exemption is very broad, including all other manufacturing industries, and thus is "the rule," notwithstanding the presence of a single isolated exception, restaurants, in addition to printers and publishers. The press has the right to be treated in accordance with the rule, not the isolated exception. If the law were otherwise, states could readily circumvent the First Amendment by taxing the press plus one other group selected at random (or selected for its lack of lobbying power or current unpopularity). This would produce the same kind of indirect violation of the First Amendment that the Court has said it will not tolerate. *Perry*, 408 U.S. at 597.

III. THE PRINTING AND PUBLISHING INDUSTRIES HAVE THE RIGHT TO BE TREATED THE SAME AS OTHER MANUFACTURERS.

Florida's coupling of printers and publishers with restaurants is insufficient to avoid a finding of impermissible singling out of the press, because the two groups are not the same in relevant respects. The First Amendment requires rational classifications, and Florida cannot rely upon an irrational linkage of printers and publishers with restaurants to avoid constitutional scrutiny. The constitution requires that printers and publishers be treated the same as other businesses with reasonable similarities. *Nordlinger v. Hahn*, 505 U.S. 1 (1992) (state cannot "treat differently persons who are in all relevant respects alike"); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336, 344 (1989) (tax classifications cannot be arbitrary or capricious); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 527 (1959) (real differences in character or nature are required to justify disparate treatment); *F.S. Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) (illusory distinctions will not support tax classifications).

Printers and publishers are like other manufacturers in important business respects, and are unlike restaurants in nearly all relevant respects. As a practical matter, for instance, printers' and publishers' purchases of capital equipment are very similar in scale and purpose to purchases by other industrial manufacturers, and not even remotely comparable to restaurants' purchases of capital equipment. Donnelley's purchases cost over $30 million dollars; such an investment in capital equipment for a restaurant is unimaginable. The stark contrast between the nature of the tangible personal property produced by the two types of entities—the printed word versus prepared food—also underscores the First Amendment implications of the statute. These considerations illustrate that Florida's linkage of printers and publishers with restaurants is no more rational than is its refusal to link printers

and publishers with other manufacturers. Thus, excepting restaurants from the sales and use tax exemption, and taxing the press while exempting other manufacturers, do not satisfy the First Amendment.

IV. THE STATE HAS FAILED TO ARTICULATE ANY RATIONAL BASIS FOR ITS DISCRIMINATORY TAX SCHEME.

The Florida court merely speculated about what state interest might have prompted Florida to tax printers and publishers while creating a tax incentive to encourage all other manufacturers to enter the state or expand existing operations. The court's primary theory was that Florida might have decided to disfavor automation because it did not "offer[] special advantages or benefits to Florida such as job creation . . . ." The court failed to appreciate that the same argument could readily apply to many, if not all, manufacturers purchasing expensive capital equipment. Yet the state clearly has not imposed a sales and use tax burden on these other manufacturers as a penalty for increasing automation.[3] Florida's classification of printers and publishers separately from other manufacturers is irrational.

The Florida court's second speculative rationale, that the state may have wanted to treat all members of the media the same, is equally insupportable. This Court need look no further than the *Magazine Publishers* litigation to see that even during the time period in question here, Florida openly discriminated between different members of the media. *Department of Revenue v. Magazine Publishers of America, Inc.*, 604 So. 2d 459, 463 (Fla. 1992) (on remand from *Miami Herald Pub. Co. v. Department of Revenue*, 499 U.S. 972 (1991), finding unconstitutional Florida's disparate treatment of magazines and

[3] Ironically, the undisputed evidence below was that the equipment purchases at issue required Donnelley to hire additional personnel, not less.

newspapers). The fact is, Florida has not advanced *any* rationale for the tax, and the only two theories the Department or the Florida court could conjure up are contrary to the undisputed evidence. This pretense must end.

CONCLUSION

The Court should exercise its jurisdiction to review this case in order to remedy Florida's impermissible infringement of printers' and publishers' First Amendment rights, and order Florida to refund the sales and use taxes that printers and publishers paid under the state's discriminatory tax scheme.

Respectfully submitted,

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October 31, 1996

Supreme Court, U.S.
FILED
OCT 31 1996
CLERK

(5)

No. 96-516

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1996

R.R. DONNELLEY & SONS COMPANY
Petitioner,

v.

LAWRENCE H. FUCHS, Executive Director of the Department of Revenue of the State of Florida, and DEPARTMENT OF REVENUE, THE STATE OF FLORIDA,
Respondents.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL FLORIDA, FIRST DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

[Petitioner's question restated]

Whether a state sales tax of general applicability, which applies to all non-exempt purchases of tangible personal property, and which does not single out the press for special treatment, violates the First Amendment and the Equal Protection Clause of the United States Constitution?

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STATEMENT OF THE FACTS

This case concerns the interpretation and application of a taxing statute (Section 212.05, Florida Statutes); an exemption statute from the taxing statute (Section 212.08(5)(b)1. and 2., Florida Statutes); and an exception to the exemption from a taxing statute (Section 212.08(5)(b)5., Florida Statutes).

Section 212.05, Florida Statutes, imposes a tax upon the sale of tangible personal property. The tax is applied to ALL sales of tangible personal property including equipment and machinery used by Florida businesses. Contained in Chapter 212, Florida Statutes, is an **exemption** from the payment of sales tax, imposed by Section 212.05, Florida Statutes, on the purchase of certain items "used" in a new or expanding business. Section 212.08(5)(b)1. and 2., Florida Statutes, provides an exemption from the payment of sales tax on the purchase of machinery and equipment used in the manufacturing, processing, compounding or producing items of tangible personal property.

Machinery or equipment used by a business for

purposes other than the manufacturing or producing items of tangible personal property are **not** subject to the exemption. Section 212.08(5)(b)5., Florida Statutes, contains a list of those industries that process, manufacture, compound, or produce items of tangible personal property that are not eligible for the exemption; those industries are specifically excepted from the exemption to the Florida sales tax. The purchase of machinery and equipment by printing or publishing firms are not eligible for the exemption. Section 212.08(5)(b)5., Florida Statutes

R.R. Donnelley & Sons Co. (hereafter "Donnelley"), is a large commercial printing company. Donnelley opened a new printing plant in Florida in 1991. Donnelley purchased machinery and equipment to be used in the printing process. In 1993, Donnelley expanded its printing operation, purchased additional equipment and remitted the sales tax on those purchases. Thereafter, Donnelley submitted a request for a refund to the Florida Department of Revenue (hereafter "the Department"), citing the exemption found in Section 212.08(5)(b)1. and 2., Florida Statutes. The

Department denied the request based on the provisions in Section 212.08(5)(b)5., Florida Statutes.

However, Section 212.08(5)(b)5., Florida Statutes, was amended during the 1996 Florida Legislative session. Under Chapter 96-320, Section 15, p. 1524-1526, Laws of Florida, the Florida Legislature decided to extend the exemption contained in Section 212.08(5)(b)1. and 2., Florida Statutes, to printing firms, such as Donnelley, by removing printing firms from the exception contained in Section 212.08(5)(b)5., Florida Statutes. Effective July 1, 1996, printing firms are now exempt from remitting sales tax on purchases of equipment for new and expanding businesses, so long as all other applicable conditions under 212.08(5)(b)1. and 2., Florida Statutes, are met by the printing firms. Any future impact that would come from a decision on the merits by this Court, have now been mooted.

STATEMENT OF THE CASE

On November 9, 1993, Donnelley filed a complaint, and later an amended complaint, challenging the validity of Section 212.08(5)(b)5., Florida Statutes. Donnelley did not

challenge the underlying sales tax, Section 212.05, Florida Statutes, or the exemption from the payment of the sales tax for machinery or equipment, Section 212.08(5)(b)1., or Section 212.08(5)(b)2., Florida Statutes. Donnelley challenged the **exclusion** from the exemption contained in Section 212.08(5)(b)5., Florida Statutes. The relief Donnelley sought was an "extension" of the exemption.

The trial court denied the relief sought by Donnelley and the First District Court of Appeal affirmed the trial court. *R.R. Donnelley & Sons Co. v. Fuchs*, 670 So. 113 (Fla. 1st DCA 1996). Donnelley sought discretionary review before the Florida Supreme Court, which was denied. *R.R. Donnelley & Sons Co. v. Fuchs*, 677 So. 2d 841 (Fla. 1996).

SUMMARY OF ARGUMENT

Donnelley has not presented a Federal question under either the First Amendment or the Equal Protection Clause for resolution by this Court. Florida has not singled out the press for taxation upon the purchase of new equipment.

The Florida sales tax is one of general application permissible under the First Amendment. Florida has not singled out the press in the exception to the exemption. A host of industries are similarly treated.

Donnelley has not shown an "infringement" of any constitutional right under the First Amendment. There has been no abridgement of First Amendment guarantees.

Florida's exemption from taxation does not infringe on any of the Petitioner's First Amendment rights, is not inconsistent with any decision of this Court or another state supreme court, and does not present an important issue of federal law.

Donnelley misconstrues and misapplies an Equal Protection analysis. Other industries which "manufacture" tangible personal property for sale are included in the

exception to the exemption. There is no proof that there is any invidious reason for printers not receiving the exemption or that printers are singled out based on the content of what they print. Section 212.08(5)(b)1., 2., and 5., Florida Statutes, fully meets Equal Protection standards.

Section 212.08(5)(b)5., Florida Statutes, was amended during the 1996 Florida Legislative session. Under Chapter 96-320, Section 15, p. 1524-1526, Laws of Florida, the Florida Legislature decided to extend the exemption contained in Section 212.08(5)(b)1. and 2., Florida Statutes, to printing firms, such as Donnelley. Any future impact that would come from a decision on the merits by this Court, have now been mooted. The Petition should be denied.

REASONS FOR DENYING THE WRIT

THE DECISION BELOW IS NOT IN CONFLICT WITH DECISIONS OF THIS COURT OR THE MASSACHUSETTS SUPREME JUDICIAL COURT

Donnelley has not presented a Federal question under either the First Amendment or the Equal Protection Clause for resolution by this Court. Florida has not singled out the press for taxation upon the purchase of new equipment. All purchases of new equipment are subject to the sales tax in Florida. In order to encourage manufacturing in an otherwise tourist dependent state, the Florida Legislature has enacted an exemption from the payment of sales tax to certain manufacturing businesses when they purchase equipment used in the manufacturing process. By this means, the Florida Legislature hopes to encourage manufacturers to locate in Florida and to bring diversification to the State's economy.

Donnelley claims that its First Amendment rights are violated because it must pay a "printing tax." This is untenable. The Florida sales tax is one of general application

permissible under the First Amendment. *See Arkansas Writer's Project, Inc., v. Ragland*, 481 U.S. 221 (!987); *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 586 n.9 (1983). Florida has not singled out the press in the exception to the exemption. A host of industries are similarly treated. Certainly, there is no discrimination based on the content of any particular idea which Donnelley might espouse, nor any showing of any invidious attempt by Florida to suppress the dissemination of ideas. Donnelley's inability to take advantage of an exemption does not run afoul of either the United States Constitution or the Florida Constitution.

All purchases of printing equipment are subject to the exception to the exemption. There is no question that the purchases in question are properly subject to the sales tax. The basis of Donnelley's complaint is the Florida Legislature did not choose to exempt the purchase of printing equipment from the imposition of the sales tax.

The Florida Supreme Court has held that the retail sales of newspapers and magazines are subject to sales tax.

See Department of Revenue v. Magazine Publishers, Inc., 603 So. 2d 459 (Fla. 1992). The Florida Supreme Court found that Florida's sales tax, imposed by Chapter 212, Florida Statutes, is a tax of general applicability, which applies to receipts from the sales of tangible personal property, unless specifically exempted, and does not single out the press for special treatment.

Donnelley has not shown an "infringement" of any constitutional right under the First Amendment. There has been no abridgement of First Amendment guarantees. *See Branzburg v. Hayes*, 408 U.S. 665, 681 (1972). In *Branzburg*, this Court, in describing the facts of the cases before it that concerned the question of whether a reporter could be required to testify before a grand jury after witnessing a crime, stated "but these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of

published material is at issue here." *Id.*, at 681.

Donnelley relies primarily on *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983). In that case, Minnesota enacted a "special tax" that did not apply to anyone except the press. In fact, it affected only " . . . 11 publishers, producing 14 of the 388 paid circulation newspapers in the State . . ." *Minneapolis Star*, 460 U.S., at 578. This Court agreed that a tax of general applicability can be imposed upon the press. *Minneapolis Star*, 460 U.S., at 581. But what the Court found invalid was that Minnesota chose not to apply its general sales tax to the newspapers, in their purchase of ink and paper, but chose instead to create a new and separate tax effecting only the press. *Minneapolis Star*, 460 U.S., at 582. Rather than taxing the ultimate retail sale, Minnesota chose to tax the tangible components of the press. *Id.* This Court also struck the tax because, besides singling out the press, it then discriminated against a small group of newspapers. *Minneapolis Star*, 460 U.S., at 591.

Donnelley also cites *Grosjean v. American Press Co.*,

297 U.S. 233 (1936). This case is very narrow in scope. In *Grosjean*, a state used a tax as a direct weapon to strike at the dissenting press. "All but one of the large papers subject to the tax had 'ganged up' on Senator Huey Long, and a circular distributed by Long and the Governor of Louisiana to each member of the state legislature described 'lying newspapers' as conducting a 'vicious campaign' and the tax was 'a tax on lying, 2c [*sic*] a lie.' *Minneapolis Star & Tribune Co. v. Minnesota Com'r of Revenue*, 460 U.S. at, 579-580. The Court compared the Louisiana tax to the English Parliament's attempt to muzzle the colonists through the Stamp Act tax on newspapers and pamphlets.

The Florida decision in *Donnelley*, also does not conflict with the decision in *Globe Newspaper Co. v. Commissioner of Revenue*, 571 N.E.2d 617 (Mass. 1991). The legislative action in Massachusetts differs from that of Florida. In Massachusetts, all manufacturers were eligible to receive the exemption from certain sales taxes. This included all machinery and replacement parts in all manufacturing processes. *Id.*, at 618. The error committed

by that legislature was to remove publishing, and only publishing, from the scope or the exemption. Thus publishing was singled out for differential tax treatment. Such is not the case in Florida.

Donnelley has neglected to discuss *Leathers v. Medlock*, 499 U.S. 437 (1991). This Court answered the claims Donnelley wishes to again raise. Taxing one media "differently from other media does not by itself, . . ., raise First Amendment concerns." *Id.*, 499 U.S., at 444. *Leathers* suggests that differential tax treatment among the press based upon format was permissible so long as the differential tax treatment does not have the effect of singling out a small group within the media. A review of its past cases led this Court to rule that:

> differential taxation of First Amendment speakers is constitutionally suspect when it threatens to suppress expression of particular ideas or viewpoints.

Leathers, 499 U.S., at 447. A threat to suppress expression comes by 1) singling out the press; 2) targeting a small group of speakers; or 3) discriminating on the basis of the content

of the speech. *Leathers,* 499 U.S., at 447. If a state tax scheme does not implicate any of the three enumerated evils, then there has been no First Amendment infringement. Section 212.08(5)(b), Florida Statutes, does not implicate any of the enumerated evils.

It is apparent that Florida's taxing statutes, and Section 212.08(5)(b)5., Florida Statutes, specifically, do not single out the press; do not target a small group of the press and do not discriminate because of content. All purchases of machinery are subject to the Florida sales tax. Section 212.05, Florida Statutes. Only where there is an express exemption from Section 212.05, Florida Statutes, will a purchaser not have to pay the Florida sales tax.

So what is exempt? Only "new" machinery for a "new" or "expanding" business is eligible for the exemption. New or replacement machinery for an existing business is not eligible, including toaster manufacturers and publishing houses. New equipment purchased after a "new" business goes into operation is not exempt. Section 212.08(5)(b)1., Florida Statutes. New equipment not identified as "Section

38 property" under Section 48(a)(1)(A) of the Internal Revenue Code is not exempt. Section 212.08(5)(b)6.a., Florida Statutes. If the expanding business does not increase the output by 10 percent, the equipment is not exempt. Section 212.08(5)(b)2., Florida Statutes. In an expanding business, only the amount of sales tax in excess of $100,000, no matter the business, is exempt. Section 212.08(5)(b)2., Florida Statutes. Finally, a number of industries that produce tangible personal property in Florida, along with publishing companies, are not entitled to the exemption. Section 212.08(5)(b)5., Florida Statutes. For example, electric utilities do produce tangible personal property in the form of electrical energy[1/], mining companies produce and process phosphate, and oil and gas is produced after the refinery process. Printing and publishing companies are NOT the only producers of tangible personal property that do not receive the exemption.

[1/] Electric energy is specifically defined as tangible personal property in Section 212.02(20), Florida Statutes.

The Legislature created an exemption, based on use, for machinery and equipment used in new and expanding businesses in this State. Section 212.08(5)(b), Florida Statutes, and Section 212.08(5)(b) 1., and 2., Florida Statutes, state in pertinent part:

> (5) EXEMPTIONS: ACCOUNT OF USE.
> (b) Machinery and equipment used to increase productive output.--
> 1. Industrial machinery and equipment purchased for use in new businesses which manufacture, process, compound or produce for sale . . . items of tangible personal property at fixed locations are exempt from the tax imposed by this chapter. . . .
> 2. Industrial machinery and equipment purchased for use in expanding manufacturing facilities or plant units which manufacture, process, compound, or produce for sale . . . items of tangible personal property at fixed locations in this state are exempt from any amount of tax imposed by this chapter in excess of $100,000 per calendar year. . .

However, the Legislature excepted from the "exemption" the purchase of equipment or machinery used by certain listed industries in Section 212.08(5)(b)5., Florida Statutes, which

states:

> 5. The exemptions provided in subparagraphs 1. and 2. do not apply to machinery or equipment purchased or used by electric utility companies, communications companies, phosphate or other solid minerals severance, mining, or processing operations, oil or gas exploration or production operations, printing or publishing firms, any firm subject to regulation by the Division of Hotels and Restaurants of the Department of Business Regulation, or any firm which does not manufacture, process, compound, or produce for sale . . . items of tangible personal property. (e. s.)

Those industries listed in Section 212.08(5)(b)5., Florida Statutes, cannot utilize the exemption created by Section 212.08(5)(b)1., and 2., Florida Statutes.

Neither the exemption or the exception from the exemption are based upon the content of any speech or speaker. Section 212.08(5)(b)1., 2., and 5., Florida Statutes.

The Florida Legislature, like many state legislatures, made a decision to encourage businesses not present in Florida to come and set up a manufacturing plant in

Florida.[2]/ The states need to have the latitude to give incentives to companies that create jobs.

Florida's exemption from taxation does not infringe on any of the Petitioner's First Amendment rights, is not inconsistent with any decision of this Court or another state supreme court, and does not present an important issue of federal law.

Donnelley has implicitly raised an Equal Protection argument. Petitioner's Brief, p.10. Donnelley claims the Florida courts have erred in applying Equal Protection criteria to Donnelley. Donnelley claims that its rights under the Equal Protection Clause of the United States Constitution have been violated because Donnelley must pay the tax on its purchases of machinery to begin and to expand its business in Florida. To this end, Donnelley submits that it manufactures tangible personal property for sale and does

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[2]/ For example, Florida has been encouraging motion picture companies to set up studios in Florida. To help the companies, Florida has exempted the purchase of many types of equipment used in the motion picture business. *See* Section 212.08(5)(b)1., Florida Statutes.

not receive an exemption. Donnelley submits that because other companies which manufacture tangible personal property for sale do receive the exemption; Donnelley's rights are violated.

Donnelley misconstrues and misapplies an Equal Protection analysis. Other industries which "manufacture" tangible personal property for sale are included in the exception to the exemption. One example is the restaurant industry. Thus, even within the "class" Donnelley seeks to establish, Donnelley is not alone in being excluded from the exemption. There is no proof that there is any invidious reason for printers not receiving the exemption or that printers are singled out based on the content of what they print.

Clearly, tax exemptions in Florida represent a legislative decision that there is a State purpose to be served in relieving a particular person or business from the imposition of the tax. This legislative decision must have a rational basis. That is, there must be a rationally conceivable basis for the classification for states are given great latitude

in making tax classifications and the burden is very heavy on one who seeks to overturn such a classification. *Madden v. Commonwealth of Kentucky*, 309 U.S. 83, 87-88 (1940). A statute that discriminates in favor of a certain class is not arbitrary if the discrimination is founded upon a reasonable distinction or difference in state policy. *Allied Stores of Ohio, Inc., v. Bowers*, 358 U.S. 522, 528 (1958).

Although the state must adhere to the principles of due process and Equal Protection when exercising its taxing power, those principles do not impose an ironclad rule of equality. The state must be allowed the flexibility and variety appropriate to taxation schemes. *Kahn v. Shevin*, 416 U.S. 351 (1974). Accordingly, the state is accorded a wide range of discretion when classifying for taxation purposes, provided that the classification is reasonable, nonarbitrary, and rests on some ground of difference having a fair and substantial relation to the object of the legislation.

In *Lindsley v. National Carbolic Gas Co.*, 220 U.S. 61, 78 (1911), this Court stated:

> When the classification in such a law is called into question, if any state of facts can

> be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.

The burden for the Department is to set out a reasonable state of facts that would support the classification. There is no requirement that such facts were considered by the Legislature nor that such facts existed when the statute was enacted.

Section 212.08(5)(b)1., 2., and 5., Florida Statutes, fully meets Equal Protection standards. The Legislature could well have determined that certain businesses offered special advantages or benefits to Florida such as job creation, increased spending in local communities, improvement to quality of life in Florida, acting as magnet to draw other businesses to Florida, or increasing tourist travel to Florida. These would all be rational grounds for a decision to relieve a company of the imposition of the tax.

The Legislature could also well have determined that printers did not offer a particular advantage or benefit to Florida or that any benefit obtained would not offset the loss of revenue caused by an exemption. For example, a modern

printing plant such as Donnelley's requires a large investment in machinery, but is highly automated. The Legislature could well have determined that this state of facts did not warrant extending the exemption to Donnelley. It is a conceivable, rational state of facts which demonstrates a rational basis for not extending the exemption to printers. Thus, the differentiation of treatment in the statute has a rational basis and should be upheld. No higher level of scrutiny is needed because there is no invidious purpose or discrimination against printers shown in the record.

Thus, the legislature's decision to exclude printers from the exemption contained in Section 212.08(5)(b)1., and 2., Florida Statutes, does not violate the Equal Protection Clause of the United States Constitution.

CONCLUSION

WHEREFORE, the Department submits, based on the foregoing arguments and authorities, that both the trial court and the district court were correct in upholding the statutes by finding that they did not violate either the First

Amendment or the Equal Protection Clause of the United States Constitution. The decisions below are consistent with the decisions of the United States Supreme Court and they warrant no further review by this Court.

Respectfully submitted,

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No. 96-516

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

R.R. DONNELLEY & SONS COMPANY,
Petitioner,

v.

LAWRENCE H. FUCHS, Executive Director of the Department of Revenue of the State of Florida, and DEPARTMENT OF REVENUE, STATE OF FLORIDA,
Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, First District

REPLY OF PETITIONER

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REPLY OF PETITIONER

Respondents concede that the Florida tax scheme at issue here is presumptively unconstitutional under this Court's First Amendment authorities provided that it "singl[es] out the press" for unfavorable treatment. Respondents' Brief in Opposition ["Opp."] 12-13 (citing *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)). Respondents also concede that this tax scheme categorically denies printing and publishing firms a tax exemption on purchases of capital equipment for new or expanding facilities — a tax exemption that is available to most, if not all, other manufacturers that purchase capital equipment for new or expanding facilities. Opp. 8, 14-15.

Respondents, like the court below, differ with petitioner on only one critical issue: whether a state may insulate a tax that

discriminates against the press from First Amendment scrutiny, under *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983), by the simple expedient of also applying the tax to at least one other category of businesses. Respondents do not dispute that, as the court below recognized (Pet. App. 6a), this issue has never been addressed by this Court. Nor do they offer any reason why this issue is not an important one for clarifying the reach of *Minneapolis Star*.

1. Respondents attempt to refute that the tax scheme "singles out" the press by arguing (i) that the tax exemption is available only to firms that buy capital equipment to start or expand a business, and not to firms that buy capital equipment for other purposes or to firms that buy non-capital equipment (Opp. 13-14), and (ii) that the exception to the tax exemption contained in Fla. Stat. § 212.08(5)(b)5 applies, by its terms, to restaurants, electric utilities, and mining companies, as well as to printing and publishing firms (Opp. 14, 18).

The first point is of no relevance whatsoever. The tax statute is discriminatory because printing and publishing firms, alone among manufacturers, are categorically denied the tax exemption in *all* circumstances. All other manufacturers are entitled to the tax exemption provided that their equipment purchases satisfy the statutory criteria (*e.g.*, that the equipment is for starting or expanding a business). The mere fact that the tax exemption is limited to purchases of particular equipment for particular uses does not justifying denying the tax exemption to the press.

The second point, while technically correct if one looks only to the words of § 212.08(5)(b)5, does not accurately describe the actual application of the overall tax scheme. As respondents' designated witness acknowledged below, although several categories of businesses are listed in § 212.08(5)(b)5, the only categories actually affected by this provision are printing firms and restaurants. *See* Pet. 5-6 & n.3. Respondents do not appear to dispute the testimony of their designated witness as to how narrowly § 212.08(5)(b)5 applies in the real world. Moreover,

in holding that § 212.08(5)(b)5 does not "single out" the press, the court below relied solely on the fact, undisputed by the parties, that restaurants, as well as printing and publishing firms, are denied the tax exemption.

2. Respondents do not dispute that, as petitioner previously explained (Pet. 9-10), the tax schemes challenged in *Minneapolis Star* and *Globe Newspaper Co. v. Commissioner of Revenue*, 571 N.E.2d 617 (Mass. 1991), like the tax scheme here, treated the press similarly to many other businesses (*e.g.*, service businesses). Accordingly, this case cannot, as respondents suggest, be distinguished from *Minneapolis Star* and *Globe Newspaper* on the ground that printers are being treated no differently than restaurants.

3. In any event, respondents fail to offer *any* reason why printing firms should be classified with restaurants — and differently from all manufacturing firms — for purposes of entitlement to the tax exemption at issue. They merely continue to suggest, as they and the court of appeal did below, that the discriminatory tax treatment of printers was motivated by legislative concerns about automation. *See* Opp. 20-21; *see also* Pet. App. 8a. They do not suggest, however, that this rationale applies to restaurants. Nor could they legitimately do so.

As petitioner previously explained, in determining whether a tax is discriminatory, the Court typically considers whether the tax falls evenhandedly on all members "of the same 'class.'" *Allegheny Pittsburgh Coal v. Webster County*, 488 U.S. 336, 343 (1989); *see* Pet. 10-11. It is irrelevant whether two taxpayers are treated similarly if they are members of different "classes." Here, given that no justification has been, or could be, offered for including printing firms and restaurants in a "class" by themselves for purposes of taxation of their capital equipment purchases, the inclusion of restaurants cannot solve the constitutional problem. The tax is thus virtually identical to the one invalidated on First Amendment grounds in *Globe Newspaper*, 571 N.E.2d at 619-20, which denied the press, but no other manufacturers, a tax exemption on new equipment purchases.

4. Respondents perceive this case to be controlled by *Leathers v. Medlock*. *See* Opp. 12. But *Leathers* has no application to this case. In *Leathers*, the Court was concerned not with a tax that discriminated *against* the press vis-a-vis other taxpayers, but rather with a tax that discriminated *among* members of the press. The Court explained that such a tax, in contrast to the tax in *Minneapolis Star*, "does not single out the press and does not therefore threaten to hinder the press as a watchdog of government activity." 499 U.S. at 447. The tax scheme at issue here is like the one in *Minneapolis Star* and unlike the one in *Leathers*: it denies to *all* printing and publishing firms a tax exemption that is available to *all* other manufacturers. This is precisely the sort of "differential taxation of the press" that, as the Court recognized in *Minneapolis Star*, places an impermissible "burden on the interests protected by the First Amendment." 460 U.S. at 585.

5. Respondents assert that "[t]here is *no proof* that there is any invidious reason for printers not receiving the exemption." Opp. 6, 18; *see also* Opp. 10-11 (attempting to distinguish *Grosjean v. American Press Co.*, 297 U.S. 233 (1936)). But no such proof is necessary. As this Court observed in *Minneapolis Star*, "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." 460 U.S. at 592; *see also Leathers*, 499 U.S. at 445 (recognizing that "*Minneapolis Star* resolved any doubts" on this score).

6. Respondents also repeatedly observe that § 212.08(5)(b)5 is not content-based. *See* Opp. 6, 8, 13, 16, 18. But neither was the tax at issue in *Minneapolis Star*. As this Court has made clear, discrimination based on content is a sufficient, but not a necessary, condition for invalidating a tax statute under *Minneapolis Star* and its progeny. *See Leathers*, 499 U.S. at 447.

7. Respondents acknowledge that this case is not mooted by the recent amendment to § 212.08(5)(b)5, which prospectively allows printing firms and some publishing firms to qualify for the tax exemption. *See* Opp. 6. The amendment, which became effective on July 1, 1996, has no retroactive application to this

case, which involves a nearly two million dollar tax on petitioner's purchases of equipment in 1990 and 1993. The tax exemption continues to be denied, moreover, to "publishing firms that do not export at least 50 percent of their finished product out of the state." Fla. Stat. Ann. § 212.08(5)(b)5. The Court has, of course, frequently granted certiorari to consider important constitutional challenges to state statutes, including tax statutes, that have since been amended or even, in contrast to the statute here, entirely repealed. *See, e.g., Fulton Corp. v. Faulkner*, 116 S. Ct. 848, 852 n.1 (1996); *Baldwin v. Alabama*, 472 U.S. 372, 373 n.1 (1985); *New York City Transit Authority v. Beazer*, 440 U.S. 568, 580-81 (1979).

9. As the briefs of *amici* Newspaper Association of America, Printing Industries of America, and Printing Association of Florida confirm, the petition presents an issue of considerable importance in clarifying the First Amendment protection that the press is entitled to under the first prong of *Minneapolis Star*. Respondents have offered no reason why this issue is not so significant as to merit the Court's attention in this case.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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November 12, 1996